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Supreme Court, U.S.
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NO_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EILEEN CONWAY,

Petitioner,

vs.

FIRST TRUST COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE NORTH DAKOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Eileen Conway
Attorney pro se
2922 Germantown Road South
Germantown, Tennessee 38138
(901 754-1057)

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QUESTIONS PRESENTED FOR REVIEW

As a matter of law, did the North Dakota Supreme Court violate the substantive and procedural due process rights and equal protection rights of Conway, beneficiary of the Estate of Selma Kjorvestad, (who died on May 15, 1974) when it "repealed in the interest of justice" the Probate Statutes of the North Dakota Century Code and rejected the Transition Provision of the Uniform Probate Code but instead applied the Uniform Probate Code which was not adopted unitl July 1, 1975, over a year after the date of death of Selma Kjorvestad?

As a matter of law, did the North Dakota Supreme Court err in ruling that the abortion of the entire probate procedure of the Estate of Selma Kjorvestad, with no Inventory of $1,646,780.00 in property; no Appraisement of $1,626,780.00

in property; no accounting in 14 years of $974,780.00 in cash assets that disappeared from Nelson County Probate Court, "is not significant"?

As a matter of law, did the North Dakota Supreme Court violate the substantive and procedural due process rights of Conway when it imposed ten financial penalties against her because her appeals of counterfeit court orders and fraudulent accounts of the Estate of Guy Kjorvestad, Sr. and the Estate of Selma Kjorvestad, combined, were "frivolous, flagrantly groundless and taken in bad faith"?

As a matter of law, did the North Dakota Supreme Court violate the substantive and procedural due process rights of Conway when they denied Conway a fair trial, deprived Conway of the

right to inspect the Docket File of the Estate of Selma Kjorvestad, and refused Conway the right to examine the former Probate Officer of First Trust on fees which constitute ten financial penalties against Conway because she exercised her right of due process of law and equal protection of the Probate Statutes of the North Dakota Century Code and the North Dakota Constitution?

As a matter of law, did the North Dakota Supreme Court err in affirming the contention of First Trust that Selma Kjorvestad was a non-legal entity, a companion, a dependent who had no legal status under North Dakota law?

As a matter of law, did the North Dakota Supreme Court err in approving, in violation of the Probate Statutes of the North Dakota Century Code, the

demands of their former associate justice on North Dakota's highest court, a total of $280,104.97 in legal fees, plus ten financial penalties with double costs, plus a $5,000.00 Reserve Retainer from the aborted, debt-free, bankrupt estate of a non-legal entity?

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First Trust v. Conway, 345 N.W. 2d 838 (February 23, 1984)

First Trust v Conway, 375 N.W. 2d 160 (N.D. October 1, 1985)

First Trust v. Conway, 395 N.W. 2d (N.D. October 28, 1986)

OPINIONS BELOW

The Judgment with Amended Opinion of the North Dakota Supreme Court, whose judgment is sought to be reviewed, is reprinted in the Appendix. The Judgment evolved from Judgment of the North Dakota Supreme Court entered on October 1, 1985. It encompasses three amended orders in the Nelson County Probate Court of the Judgment entered October 1, 1985. The amended orders of the Nelson County Probate Court, opinions and judgments of the North Dakota Supreme Court are reprinted in the Appendix.

TO The Honorables, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Eileen Conway, respectfully requests a Writ of Certiorari to review Judgment of the North Dakota Supreme Court entered May 16, 1988 with Amended Opinion entered June 28, 1988. The North Dakota Supreme Court entered Order Denying Petition for Rehearing on June 28, 1988.

JURISDICTION

The Eighth and Fourteenth Amendment of the Constitution of the United States confers jurisdiction on the United States Supreme Court to review the Judgment of the North Dakota Supreme Court.

The North Dakota Supreme Court violated the right of Conway for protection under the Eighth Amendment from "excessive fines imposed, nor cruel and unusual punishments inflicted" because she exercised her right of due process of law and equal protection of the Probate Statutes of the North Dakota Century Code and the North Dakota Constitution.

The due-process clause of the Fourteenth Amendment ensures impartial judges. The Constitution gives the United States Supreme Court the power and the duty to keep the North Dakota Supreme Court from undermining the rule of law. In an affront to constitutional law, the North

Dakota Supreme Court ignored the Eighth and Fourteenth Amendment of the Constitution; rejected the Constitution of North Dakota; repealed the Probate Statutes of the North Dakota Century Code; refused to acknowledge the Transition Provision of the Uniform Probate Code; threw out their own North Dakota Court Rules; and disregarded common law in order to cover-up probate fraud and felonies committed by a former North Dakota Supreme Court Justice, Johnson, attorney for First Trust.

The petitioner requests stay of proceedings in the North Dakota Supreme Court and the Nelson County Probate Court pending the decision of this Court.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below.

This is a Petition for Writ of Certiorari arising out of petitioner's appeal of Findings of Fact, Conclusions of Law and Order entered October 2, 1984 in the Nelson County Probate Court in Lakota, North Dakota. During oral argument on June 13, 1985, the attorney for First Trust, Johnson, demanded that his former associate justices on North Dakota's highest court levy financial penalties against the petitioner, the beneficiary of the Estate of Selma Kjorvestad, for exercising her right, under NDCC 30-20-13, 30-20-15 and Rule 5 of the N.D. Rules of Civil Proedure, to contest a fraudulent account and counterfeit court order approved in Findings of Fact, Conclusions of Law and Order.

In Opinion and Judgment, dated and entered May 16, 1988 and Amended Opinion

and Judgment, dated and entered on June 28, 1988, the North Dakota Supreme Court complied with the demand of Johnson and imposed ten financial penalties against the petitioner for her appeals of Findings of Fact, Conclusions of Law and Order, entered October 2, 1984; Amended Findings of Fact and Order Upon Remand, entered December 5, 1985; and Findings and Order Approving Fees, entered February 23, 1988. the North Dakota Supreme Court ruled:

> "We have stated that 'An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith.' Thus we deem this appeal to be frivolous under Rule 38, N.D.R.App. P." (App. p. 87)

1. Findings of Fact, Conclusions of Law and Order entered October 2, 1984.

When First Trust petitioned for a hearing on the final account for September 21, 1984, it submitted two fraudulent documents: (a) a secret, counterfeit

court order approving an interim account procured by fraud on December 8, 1982 approving an interim account of the Estate of Guy Kjorvestad, Sr. and the Estate of Selma Kjorvestad, combined; and (b) a final account of the Estate of Guy Kjorvestad, Sr. and the Estate of Selma Kjorvestad, combined.

(a) The secret, counterfeit court order procured by fraud on December 8. 1982.

Three weeks before North Dakota law changed on January 1, 1983 to require judges to have a law degree, First Trust petitioned for a hearing on an interim account before Judge Arnold Johnson, a full time farmer and part-time judge with a high school education, in Steele County, Finely, North Dakota. (Judge Johnson was substituted after Nelson County Probate Judge, Clerk of Court and Register of Deeds, Audrey Swanke, officially acknowledged two incidents of assault and batt-

ery against Conway in the Nelson County Courtroom during a hearing when Conway pleaded for an accounting of $665,000.00 in cash assets in her father's estate. After her ten-minue violent rampage the six-foot Judge Swanke forced Conway to sign deeds to 3520 acres of farmland. Judge Swanke formally withdrew as Probate Judge for the Estate of Guy Kjorvestad, Sr. and the Estate of Selma Kjorvestad in letters in the probate files. However, Judge Swanke illegally continued to sign secret court orders allowing criminals to ziphon cash assets out of bank accounts belonging to the estates. (Brief of Appellant, #870111, p. 7; Petition for Rehearing, #870111, p. 1 to 8)

First Trust and Johnson did not appear for their own hearing scheduled for 10 A.M. and claimed they had forgotten that they had petitioned for a hearing.

when they arrived in dishevelment at 12:30 P. M., Conway cited fraud, errors, omissions, discrepancies, and missing cash assets amounting to $882,740.53. Anderson and Johnson, shamefaced to be caught red-handed in probate fraud, aborted the hearing, withdrew their account and left the courtroom after the thirty-minute hearing. Twenty-two months later it was discovered that Johnson and Anderson had returned to Finely the next day to procure the signature of the judge on a court order approving the interim account which they withdrawn the day before. In violation of Rule 5 of N.D. R. Civ. P. and NDCC 30-20-15, First Trust deprived Conway of Notice and kept the court order secret for 22 months. On December 8, 1983, in sworn testimony, Anderson denied that First Trust had secured a court order approving the interim account. (App. #870111, p. 36)(Brief of Appellant, p. 14 to 24)

At the onset of the hearing on the final account on September 21, 1984, Judge Dosch who administers a two-tier court and conducts, under Supervised Administration, underground hearings and signs counterfeit court orders on demand, announced: (Tr. No. 3263, p. 36; Brief of Appellant, #870111, p. 23)

> "Should it become necessary for the Court to rule on objections we have set up, I invite Mr. Johnson to make those objections timely and I will rule on them as we go ahead.(emphasis supplied)

Deprivation of Notice to petitioner resulted in her forfeiture or divestiture of her right to inherit $882,740.53.

Prior to the hearing, Conway exercised her rights under NDCC 30-20-13, 30-20-15, 30-20-01, 30-20-02, 30-20-07, 30-20-14, 30-20-09, 30-20-05, 30-12-09, 30-15-01, 30-15-02, 30-15-03, and 30-15-09 (1) to file a petition for accounting of the Estate of Selma Kjorvesad; (2) to contest

the counterfeit court order and file written objections to it; (3) to file a written protest formally contesting the so-called "final account"; (4) to file a petition pleading to the Court to reject the final account; and (5) to file Objections to Allowance of Account. During the hearing, Conway formally petitioned again for an accounting of the Estate of Selma Kjorvestad.

Probate Officer, Anderson, made 9 perjurous statements in her narrative, substituted for a financial accounting of $974,780.00 in cash assets belonging to the estate. Anderson committed perjury when she stated that an Inventory had been filed in the Estate of Selma Kjorvestad and that she had seen it. (App. #870111, p. 47, line 3; p. 66, line 5; p. 98, line 20; p. 99, line 4;) (Tr. No. 3263, p. 31, line 4

When Anderson was examined on her so-called "final account", she practiced evasion 30 times whispering, "I don't know" or "I don't remember" or answered incorrectly. (App. #870111, p. 67, line 1, 14; p. 70, line 4, 8, 10, 13, 17, 22, 23; p. 71, line 1, 4, 7, 8, 11, 17, 20, 23; p. 72, line 2, 6, 9, 14, 20, 24, p. 79, line 25; p. 82, line 15; p. 83, line 5, 20; p. 84, line 3; p. 98, line 20; p. 103, line 17) Anderson confessed, under oath, that neither First Trust nor Johnson had ever inspected the Probate File of the Estate of Selma Kjorvestad, never read her wills, never collected her property, never preserved her property and never accounted for her property. (App. #870111, p. 61, line 25; p. 90, line 15; p. 115, line 16; p. 114, line 20; p. 115, line 2; p. 90, line 20;

The life-savings of a farmer were turned over to a girl whose over-tranquil-

ized or drugged condition alarmed the judge. (App, #870111, p. 92, line 1; p. 95, line 18; p. 98, line 7; p. 112, line 23) (Brief of Appellant, #870111, p. 9) Anderson was fired by First Trust for her condition at the September 21, 1984 hearing but First Trust demanded ten financial penalties against Conway, including a financial penalty for Anderson's performance, (Penalty #1) on September 21, 1984.

During the hearing, former North Dakota Supreme Court Justice, Johnson, negotiated with Judge Dosch to change the will of Selma Kjorvestad and alter the distribution of her estate in order to cover-up theft of the contents of 6 safe deposit boxes belonging to the Estate of Selma Kjorvestad. Deeds to 3520 acres of farmland, stocks, bonds, certificates of deposit, receipts for treasury bills, rare coins, gold, silver, diamonds and $28,500.00 in cash was stolen from the

6 safe deposit boxes. (App. #870111, p. 118 to 121)

Conway appealed the Order to the North Dakota Supreme Court. In Opinion and Judgment entered October 1, 1985, the North Dakota Supreme Court ruled: (App. p. 42)

> "We find no procedure from the old Pro Code which should be applicable in this decade to First Trust 'in the interest of justice'.(emphasis supplied) Nor, do we find any procedure in the new Probate Code which is infeasible of application to these estates."

> "Conway points out that Kjorvestad I, 250 N.W.2d at 276, approved application of old Probate Code procedures to these disputes in 1977. In that decision, this court said: "Application of former law was in the discretion of the trial court and we do not find an abuse of that discretion..." This prior discretionary application of old procedures did not fix procedural rights for the eternity of these estates. It is aximomatic that procedural modes, as distinguished from substantive rights, are not vested and are subject to repeal, modification or change.
> (App. p. 41 to 43)

> "First Trust suggests that we consider assessing its costs and attorney's fees on this appeal against Conway's

share of the estates as an appropriate method for dealing with her unrestrained and unsubstantiated accusations. We agree." (App. p. 48)

"Accordingly, we exercise our powers under Rule 38, R.D.R.App.P., and direct an award accordingly. We order that First Trust be paid its reasonable compensation, attorney's fees and costs on this appeal out of Conway's share of the estate only, rather than from the total estate as has been done heretofore." (App. p. 49)

The North Dakota Supreme Court Supreme Court remanded the case back to the Nelson County Probate Court to levy financial penalties against Conway for exercising her right of due process of law and equal protection of the laws.

2. Amended Findings of Fact, Conclusions of Law and Order Upon Remand.

Again, Johnson, the former North Dakota Supreme Court Justice, used the Nelson County Underground Probate Court because (1) Anderson had been fired by First Trust for her over-medicated and drugged condition in Nelson County Probate Court

for the hearing on the final account on September 21, 1984 and (2) to evade examination of their billings for the period beginning September 1, 1984 which included charges for preparing the fraudulent final account and counterfeit court order. (App. #870111, p. 145 to 153) To avoid examination of probate fraud, perjury and felonies, Johnson and First Trust, in violation of NDCC 30-20-15 and Rule 5 of the N.D. Rules of Civil Procedure, deprived Conway of Notice and the right to defend herself against financial penalties in a court of law.

Again, Johnson used his position as a former North Dakota Supreme Court Justice to subvert Judge Dosch to use the Nelson County Probate Court for criminal purposes. Johnson coerced Judge Dosch, under Supervised Administration, to amend the entire Opinion and Judgment of the North Dakota Supreme Court entered Octob-

ber 1, 1985. The former North Dakota Supreme Court Justice levied two financial penalties against Conway, $2,306.53 and $4,433.36, a total of $6,739.88 for appealing the final account and counterfeit court order of her mother's estate in which an Inventory of $1,646,780.00 in property had never been filed, an Appraisement of $1,646,780.00 in property had never been filed and there had never been a single accounting of $974,780.00 in cash assets. First Trust and Johnson denied Conway the right to defend herself in a court of law.

The former North Dakota Supreme Court Justice documented "findings of fact" during the underground hearing in the Nelson County Underground Probate Court, under Supervised Administration, based on the testimony of the ghost of Conway and other phantom witnesses, fictitious exhibits, imaginary affidavits, an apparitional

court reporter, specteral beneficiaries, in an unidentified city, at an undisclosed location, on an unrevealed date, at an unspecified time, in The Golden Age of Judicial Corruption. First Trust and Johnson postponed mailing the counterfeit court order to Conway until after the time had expired for her to file a Motion.

Conway appealed the counterfeit court order which levied two financial penalties against her to the North Dakota Supreme Court. In briefs and oral argument, Johnson contended that Selma Kjorvestad's beneficiary, Conway (1) had no right whatsoever to Notice of secret court orders; (App. #870111, p. 170) (2) had no right whatsoever to Notice of secret hearings; (App. #870111, p. 133) and (3) no right whatsoever to an accounting of her mother's estate. (App. #870111, p. 133) During Oral Argument, Johnson explained to his former associate justices, "My

thought process was that it was simply a practical matter!" (Tr. Oral Argument, North Dakota Supreme Court, September 24, 1986)

To cover-up probate fraud and grave judicial errors, the North Dakota Supreme Court changed "Amended Findings of Fact, Conclusions of Law and Order" entered December 5, 1985 in the Nelson County Probate Court to "Amended Order Upon Remand" and ruled:

> "Because this Amended Order Upon Remand was entered without notice or hearing it is not appealable and we dismiss appeal."

However, in its Opinion and Judgment entered on May 16, 1988 and Amended Opinion entered on June 28, 1988, the North Dakota Supreme Court levied two financial penalties against Conway because she appealed the counterfeit court orders, procured by fraud in the Nelson County Underground Court, Penalty #3 for $2,751.86 and Penalty #4 for $4,429.00,

but deprived Conway of the right to defend herself in a court of law.

In the Opinion and Judgment entered October 28, 1988, the North Dakota Supreme Court exceeded its jurisdiction and encouraged the Nelson County Probate Court to violate Conway's rights under the Fourteenth and Eighth Amendment and to exceed its jurisdiction when it ruled:

> "To avoid perpetuation of this dilemma, we suggest that the county court make <u>any</u> award therefore at the hearing, when and if it is held. (emphasis supplied) (App. p. 71)

The North Dakota Supreme Court falsely stated: (App. p. 68)

> "Conway appealed on February 1, 1986, arguing that she was deprived of a hearing on the reasonableness of the amounts of compensation and attorney's fees.

Conway appealed because her rights under the Fourteenth and Eighth Amendment were violated on September 21, 1984 when their former associate justice ambushed Conway with another counterfeit court order.

3. Findings and Order Approving Fees

Entered February 23, 1987 in the Nelson County Probate Court.

First Trust demanded that the Nelson County Probate Judge levy ten financial penalties, six of unlimited and undisclosed amounts for future fees of Anderson (who had been fired over 3 years ago) and Johnson without prior authorization from any North Dakota court, against Conway because her appeals of fraudulent accounts and counterfeit court orders procured by fraud in the Nelson County Underground Probate Court were "frivolous, flagrantly groundless and taken in bad faith". During the hearing, the Nelson County Judge denied Conway a fair trial and deprived Conway of the right to examine the former Probate Officer of First Trust on charges which constituted ten financial penalties against Conway:

Supreme Court Penalty #1 Against Conway. Penalty of $2,306.53 was levied for contesting counterfeit court orders and final account in which the entire probate procedure required by law was aborted. No Inventory has been filed of $1,646,000.00 in property, required by law. There is no Appraisement of $1,646,00.00 in property, required by law. In 14 years there has never been a single accounting of $974,780.00 in cash assets belonging to the Estate of Selma Kjorvestad. First Trust proposes to distribute NOTHING, minus ten financial penalties, minus a $5,000.00 Reserve Retainer out of $974,780.00 in cash assets to Selma Kjorvestad's beneficiary, Conway.

Supreme Court Penalty #2 Against Conway. The $4,433.36 penalty represents charges of Johnson for preparing fraudulent final account and counterfeit court orders.

Supreme Court Penalty #3 Against Conway. A double-penalty, $2,206.53 and $2,751.86 against the beneficiary for her appeal of "Amended Findings of Fact, Conclusions of Law and Order Upon Remand, procured by fraud in the Nelson County Underground Probate Court. The two penalties represent the featherbedding fees of Anderson while employed as a Hostess of First Bank for the past 3 years.

Supreme Court Penalty #4 Against Conway. The double-penalty, $4,433.36 and $4,329.00 represent charges of Johnson for preparation of fraudulent final account and counterfeit court orders procured by fraud in the Nelson County Underground Probate Court.

Supreme Court Penalty #5 Against Conway. Approval in advance without prior authorization of a North Dakota Court, for a financial penalty of undisclosed and unlimited amounts against the beneficiary

for the future fees of Johnson but deprived Conway of the right to defend herself in a court of law.

Supreme Court Penalty #6 Against Conway. The Court ordered in advance, without prior authorization of a State court, a financial penalty of undisclosed and unlimited amounts for featherbedding fees of the Hostess of First Bank since her last bill but deprived Conway of the right to defend herself in a court of law.

Supreme Court Penalty #7 Against Conway. The Court ordered in advance, without prior authorization from any State court, a financial penalty of unlimited and undisclosed amounts against the beneficiary for future fees of Johnson but deprived Conway of the right to defend herself in a court of law.

Supreme Court Penalty #8 Against Conway. The Court ordered in advance, without prior authorization from any State court, a financial penalty of unlimited and undisclosed amounts against the beneficiary for future featherbedding fees of the Hostess of First Bank but deprived Conway of the right to defend herself in court of law.

Supreme Court Penalty #9 Against Conway. In violation of their own North Dakota Rules of Disciplinary Procedure, Rules 22, and ABA Standards for Lawyer Discipline and Disciplinary Procedures, Section 8.3, the Court ordered an unlimited and undisclosed financial penalty against the beneficiary for filing a complaint against Johnson with the Disciplinary Board of the Supreme Court. (see First Trust Petition for Rehearing, 3 complaints, January 3, 1987, March 22, 1987 and April 7, 1988)

Supreme Court Penalty #10 Against Conway. The Court ordered in advance, without prior authorization of a North Dakota court, a financial penalty of unlimited and undisclosed amounts against the beneficiary for any future complaint she may file against Johnson but deprived Conway of the right to defend herself in a court of law.

Petitioner appealed the order to the North Dakota Supreme Court. In Opinion and Judgment entered May 16, 1988, the North Dakota Supreme Court affirmed in part and reversed in part the Order of the Nelson County Probate Court. The North Dakota Supreme Court reversed Penalty #9 and Penalty #10.

Petitioner filed Petition for Rehearing on May 23, 1988. First Trust filed Petition for Rehearing for additional bills and included copies of confidential complaints filed by Conway against Johnson with the Disciplinary Board of Supreme Court.

4. Amended Opinion of the North Dakota Supreme Court entered June 28, 1988.

The North Dakota Supreme Court reversed their Opinion and Judgment entered May 16, 1988. After reviewing the confidential complaints filed against Johnson, the North Dakota Supreme Court reinstated Penalty #9 against the beneficiary

with double costs and another financial penalty against Conway for additional fees for their former associate justice but deprived Conway of the right to defend herself in a court of law.

B. Manner of Raising Federal Questions of the Fourteenth Amendment in Nelson County Probate Court: (Case No. 3263)

1. In dozens of telephone calls over a period of several months, Conway requested copies of the Docket File of the Estate of Selma Kjorvestad in order to comply with Rule 30(a)(3) of N.D. Rules of Civ. P. Clerk of Court Swanke and Clerk of Court Pederson denied all requests.

2. Conway mailed a certified letter with a check to Clerk of Court Swanke requesting copies of the Docket File of her mother's estate. In a letter dated December 11, 1987, stated that she and Judge Jonal Uglem "are in complete agreement that the docket sheet is not considered part of this

file" (App. p. 96)

3. Conway hired an attorney to secure the Docket File for her mother's estate. In an undated letter, Swanke stated that she and Judge Jonal Uglem were refusing the request (App. p. 98)

4. Conway flew to North Dakota and traveled Lakota on January 31, 1988. On February 1, 1988, Conway went to the office of the Clerk of Court to request copies of the Docket File, stating that it was required for her appeal to the North Dakota Supreme Court. Deputy Clerk of Court Susan Pederson denied the request.

5. Conway filed Petition to Inspect Probate File, Including Docket File, of the Estate of Selma Kjorvestad. Judge Jonal Uglem and Clerk of Court Swanke ignored the petition. (App. p. 100)(Petition for Rehearing, #870111, ps. 1 to 9)

5. During the hearing before Judge Jonal Uglem on February 10, 1987 (Case No.

3263) in Nelson County Probate Court, Conway pleaded for the right of due process of law and equal protection of the Probate Statutes in the bicentennial of the Constitution: (Tr. p. 17, line 11; p. 18, line 24; p. 34, line 9; p. 35, line 19, 21; p. 44, line 2; p. 51, line 1, 8, 17; p. 52, line 16; p. 53, line 4 p. 55, line 9; p. 57, line 1, 20; p. 58, line 7; p. 59, line 4)

C. Way in Which Federal Questions Were Passed Upon by Nelson County Probate Court.

1. The judge threatened to terminate the hearing 17 times if Conway attempted to examine First Trust on charges for probate services rendered on Exhibits #1 to #4, the basis for the ten penalties against Conway: (Tr. p. 17, line 7, 21; p. 18, line 22; p. 19, line 6; p. 28, line 11; p. 29, line 7; p. 32, line 20; p. 33, line 13; p. 38, line 25; p. 39, line 22; p. 41, line 23; p. 42, line 12, 23; p. 43,

line 15; p. 44, line 20; p. 51, line 23)

During the hearing in Nelson County Probate Court on February 10, 1987, Judge Jonal Uglem denied Conway a fair trial and deprived Conway of the right to examine First Trust on Exhibits #1 to #4, the billings from September 1, 1984 to January 31, 1987, the period that included charges for the fraudulent final account and counterfeit court orders, procured by fraud. (App. #870111, p. 145 to 153)

1. Anderson refused to answer. Johnson Objected. Judge sustained. (Tr. p. 12, line 4)

2. Anderson refused to answer.
(Tr. p. 13, line 1)

3. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 15, line 4)

4. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 16, line 15)

5. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 17, line 18)

6. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 17, line 22)

7. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 17, line 25)

8. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 18, line 2)

9. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 18, line 7)

10. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 18, line 10)

11. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 18, line 14)

12. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 18, line 17)

13. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 18, line 20)

14. Anderson refused to answer. Johnson objected. (Tr. p. 25, line 17)

15. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 28, line 20)

16. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 32, line 24)

17. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 33, line 4)

18. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 34, line 22)

19. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 35, line 23)

20. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 36, line 6)

21. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 37, line 2)

22. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 37, line 10)

23. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 38, line 23)

24. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 39, line 8)

25. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 39, line 25)

26. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 40, line 3)

27. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 41, line 2)

28. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 41, line 24)

29. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 42, line 6)

30. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 42, line 22)

31. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 43, line 1)

error

32. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 46, line 23)

33. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 48, line 16)

34. Anderson refused to answer. Johnson objected. (Tr. p. 50, line 6)

35. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 50, line 9)

36. Judge blocked answer. (Tr. p. 51, line 20)

37. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 52, line 3)

38. Anderson refused to answer. Johnson objected. Judge sustained. (Tr. p. 54, line 16)

39. Anderson refused to answer. Johnson objected. (Tr. p. 21, line 3)

Johnson claimed that Anderson's refusal to answer 38 times, Johnson's objection 37 times and the judge's sustainment 36 times was:

> "...direct personal testimony as to services performed and the reasonableness of those services and I submit that is more than sufficient." (File No. 3263, Tr. p. 54, line 25; p. 72, line 20)

In Findings and Order Approving Fees, entered February 23, 1988, Judge Jonal Uglem ruled:

"The testimony of Pamela Anderson as an employee of First Trust Company of North Dakota familiar with the instant estates as well as experienced in administration of other estates is accurate and trustworthy." (App. p. 76)

D. Manner of Raising Federal Questions of Fourteenth Amendment in the North Dakota Supreme Court.

Brief of Appellant, No. 870111.

Issues: II, III, IV, and V.

Statement of the Case: p. 4, line 2, 12, 26; p. 5, 9, 13, 21.

Law and Argument: p. 9, line 6; p. 10, line 22, 38; p. 16, line 15; p. 24, line 20; p. 30, line 29, 34; p. 31, line 7, 20; p. 33, line 1, 17; ps. 36 to 38; p. 39, line 1, 27; p. 40, line 18; p. 41, line 15; p. 42, line 36; p. 43, line 1; p. 48, line 36.

Reply Brief, No. 870111:

p. 1, line 14, 31; p. 10, line 1, 7, 20.

Petition for Rehearing, No. 870111.

ps. 1 to 4; App. p. 1 to 4.

E. Manner of Raising Federal Question of Eighth Amendment in the North Dakota Supreme Court.

Brief of Appellant, No, 870111:

Issues: III, IV, and V.

Statement of the Case: p. 4, line 2, 12, 26; p. 4, line 9, 13, 31.

Law and Argument: p. 24, line 20; p. 30, line 29, 34; p. 31, line 7, 20,34; p. 33, line 1, 17; p. 34, line 14; p. 39, line 1, 27; p. 40, line 18; p. 41, line 15; p. 42, line 26; p. 43, line 1; p. 45, line 1, 8, 15; p. 48, line 1, 36.

Reply Brief, No. 870111:

p. 1, line 14, 31; p. 10, line 1.

Petition for Rehearing, No. 870111:

ps. 1 to 4; App. ps. 1 to 4.

F. Way in Which Federal Questions Were Passed Upon by the North Dakota Supreme Court:

1. In Opinion and Judgment entered May 16, 1988, the North Dakota Supreme Court ruled:

"An appeal is frivolous if it is flaggrantly goundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith." (App. p. 86)
"We deem this appeal to be frivolous under Rule 38, R.D.R. App. P." (App. p. 87)

"Because there was no affidavit documenting work on this appeal, we award only double costs and attorney fees in the amount of $250, which are to be paid out of Conway's share of the estates." (App. p. 88)

1. In Opinion and Judgment, the North Dakota Supreme Court reversed Penalty #9 and Penalty #10 against Conway but substituted another penalty against Conway for fees for the former associate justice, Johnson.

2. The North Dakota Supreme Court refused to unseal and open the Docket File of the Estate of Selma Kjorvestad.

3. The North Dakota Supreme Court entered "Amended Opinion" on June 28, 1988 and imposed an additional financial penalty against Conway for $4, 582.05 but denied Conway the right to defend herself in a

court of law.

On the demand of the former North Dakota Supreme Court Justice, Johnson, the North Dakota Supreme Court, in violation of the Probate Statutes of the North Dakota Century Code, has approved $280,104.97 in legal fees, plus ten financial penalties against Conway plus a $5,000.00 Reserve Retainer from the debt-free bankrupt Estate of Selma Kjorvestad for aborting the entire probate procedure required by law.

ARGUMENT

Selma Kjorvestad died on May 15, 1974. The Will of Selma Kjorvestad is probated under the Probate Statutes of the North Dakota Century Code. The North Dakota State Legislature extended the protection of the Probate Statutes of the North Dakota Century Code under NDCC Article VII, 30.1-35 of the Uniform Probate Code. (App. p. 107)

In a letter regarding the tax consequences of deaths prior to July 1, 1975, the Office of the North Dakota Tax Commission required that the Estates of Selma Kjorvestad, who passed away prior to July 1, 1975, be probated under the North Dakota Code that was in force on the date of her death. (App. p. 121)

1. The North Dakota Supreme Court exceeded its jurisdiction when it "repealed in the interest of justice" the Probate

Statutes of the North Dakota Century Code Article VII, 30.1-35-01 (8-101) Subsection 1 and 2(a) passed by the North Dakota State Legislature to protect the estates of farmers.

2. The North Dakota Supreme Court violated Conway's right of due process of law and equal protection of the Probate Statutes of the North Dakota Century Code when it "repealed in the interest of justice" the Probate Statutes and instead applied the Uniform Probate Code which was not adopted until July 1, 1975, over a year after the date of the death of Selma Kjorvestad, May 15, 1974.

> "We find no procedure from the Old Probate Code which should be applicable in this decade to First Trust 'in the interest of justice'."

> "Conway points out that Kjorvestad I, 250 N.W. 2d at 276, approved application of the old Probate Code procedures in those disputes in 1977. In that decision this Court said: 'Application of former law was in the discretion of the trial court and we

> do not find an abuse of that discretion.' This prior discretionary application of old procedures did not fix procedural rights for the eternity of those estates. It is axiomatic that procedural rights, are not vested and change subject to repeal, modification or change." (App. p. 42, 43) (emphasis supplied)

3. The North Dakota Supreme Court ruled that the abortion of the entire probate procedure of the Estate of Selma Kjorvestad, required by North Dakota law, "is not significant". There has never been a single accounting of $974,780.00 in cash assets in 14 years and the Estate of Selma Kjorvestad is bankrupt. The only distribution from the Estate of Selma Kjorvestad was triggered when Lorraine Parker forged the signature, "Eileen Conway" to a check for $35,000.00 nine months before she asked the North Dakota Supreme Court to approve the distribution. The so-called "Settlement" stipulated that there would be an accounting of the Estate of Selma Kjorvestad first and then

the grain would be sold and the proceeds would go to the Estate of Selma Kjorvestad. There was never an accounting of the grain. (Settlement, P. 12, line 12)

"THE COURT: Okay, and will that money the be realized to go into the estate?
MR. PEARSON: Yes, Your Honor.
THE COURT: Proceeds to the estate."

An accounting of grain was blocked to cover-up massive federal and state income and estate tax fraud that forced the estates to pay $417,868.13 in additional taxes, additional interest, penalties, and attorneys' fees which enriched First Trust but bankrupted both estates. In seven flawed decisions, the justices of the North Dakota Supreme Court have made false statements to cover-up massive probate fraud against the Estate of Selma Kjorvestad. The statements made in recent opinions are in direct conflict with rulings of the North Dakota Supreme Court in previous decisions.[1] See "Chickens

Come Home to Roost on the North Dakota Supreme Court". (Appellant's Reply Brief, #870111, ps. 2 to 10)

4. The North Dakota Supreme Court upheld the position of First Trust that Selma Kjorvestad was only a "companion", a farmer's wife, a non-legal entity who was not entitled to have her estate probated under the protection of the State of North Dakota. To cover-up massive income and estate tax fraud, First Trust asserted that Guy Kjorvestad, Sr. and Selma Kjorvestad legally were only one person and one estate. Selma Kjorvestad, in her own name, owned farms, real estate, grain in 5 grain elevators, grain store in steele buildings on farms, stocks, bonds, certificates of deposit, treasury bills, savings accounts, checking accounts, insurance policies, gold, silver, rare coins diamonds and cash and 6 safe deposit

boxes. First Trust illegally moved cash assets and redeemed cash assets belonging to Selma Kjorvestad to transform the debt-free, cash-heavy Estate of Selma Kjorvestad into the bankrupt estate of a disfranchised non-person in order to cover up massive estate tax fraud. The U. S. District Court has ruled that a farmer's wife is a separate person, under the law in Women Involved in Farm Economcics v. U.S.D.A., 682 Federal Supplement 599.

5. The North Dakota Supreme Court violated the constitutional rights of Conway under the Eighth and Fourteenth Amendment when it levied ten financial penalties against Conway for contesting the fraudulent final account and counterfeit court orders in which the entire probate procedure was aborted and $974,780.00 in cash assets disappeared from Nelson County Probate Court without a single accounting. The North Dakota Supreme Court ruled that

Conway's appeal was "frivolous, flagrantly groundless and taken in bad faith". The North Dakota Supreme Court demands, under threat of penalties, that the victim of the crimes, sanction the crimes of the former North Dakota Supreme Court Justice.

6. The North Dakota Supreme Court denied Conway a fair trial and, in violation of the North Dakota Constitution, Section 5 and 6, deprived Conway of access to the Docket File of her mother's estate. (App. p 96 to 104)

7. The recent rulings of the North Dakota Supreme Court are in direct conflict with previous decisions of the Court and even contradict their own rulings in these estates. For example, the North Dakota Supreme Court claims that Conway had a duty to account. In violation of law, the North Dakota Supreme Court affirmed an order which enjoined Conway from

ever asking about a penney of $665,000.00 in cash assets in her father's estate and enjoined Conway from every asking about a penney of $974,780.00 in her mother's estate, "or any other assets, or any other business of the estates". (App. #870110, p. 7) This is why a member of the Joint Committee of Professional Discipline of the National Center of Professional Responsibility of the American Bar Association stated that North Dakota has been targeted as the prime problem state for judicial corruption.

The ruling of the North Dakota Supreme Court violate the fundamental principle that one shall have notice of any judicial proceeding affecting one's rights. Deprivation of Notice affected the substantial rights of Conway and resulted in her forforfeiture or divestiture of her right to inherit $882,740.53. Deprivation of Notice foreclosed Conway

from the right to defend herself in a court of law against financial penalties imposed by the North Dakota Supreme Court.

The North Dakota Supreme Court held in Crowl v. Wentz, 107 N.W. 2d 697, 700 (N.D. 1961):

> "Where giving of notice is relied on to sustain forfeiture or divestiture of one's rights, statutory direction as to how such notice shall be given must be strictly complied."

Quoting from an earlier decsion in Nelson v. Ecklund, 68 N.D. 724, 288 N.W. 273, 277 (1938), the Court decided:

> "No decree...so materially affecting the rights of property and person, can be valid, unless the party to affected has had an opportunity to be heard in defense of his rights."

In Goetz v. Gunsch, 80 N.W. 2d 548, (December 19, 1956), the North Dakota Supreme Court ruled:

> "Where judgment is procured by extrinsic fraud, upon discovery of fraud, or when such fraud is called to the attention of court, court has power and authority to vacate such judgment."

The North Dakota Supreme Court held in Paul v. Paul et al, 170 N.W. 658, (February 11, 1919):

> "Judgment or decree procured through extrinsic fraud practiced upon the court may thereafter at any time be vacated and set aside as wholly void."

The same Court ruled in Lewis v. Poel, 136 N.W. 2, 7, (July 13, 1965):

> "If fiduciaries, their attorneys, and parties in interest, cooperated for personal profit in secret mismanagement of three estates at the expense of one or more of the estate and to the detriment of minor beneficiary of each estate, the beneficiary's assignee was entitled to account and other relief for fraud."

This Court ruled in Hammon v. Weiss, 208 N.W. 2d 578:

> "Orders of the probate court fraudulently obtained are not res judicate."

The North Dakota Supreme Court decided in Danks v. Holland, 246 N.W. 2d 86 (September 26, 1976):

> "Where appeal was not flagrantly groundless, costs would not be assessed in favor of successful plaintiff on theory that the appeal was frivolous."

In Hoerr v Northfield Foundry and Machine Company, 376 N.W. 2d 323 (N.D. 1985) the same Court ruled:

> "An award of damages, costs and attorney fees are not justified for an appeal which is neither frivolous or taken in bad faith."

Conway asserts an appeal of a final account and counterfeit court orders is not "frivolous" if the entire probate proceding of the estate has been aborted; no accounting of $974,780.00 in 14 years; First Trust proposes to distribute NOTHING, minus ten financial penalties, minus a $5,000.00 Reserve Retainer, to Selma Kjorvestad's beneficiary; and the debt-free Estate of Selma Kjorvestad is bankrupt with no records in the Nelson County Probate Court of the disbursement of her cash assets.

8. In violation of their own N.D. Rules of Disciplinary Procedure, Rule 22 (a) and the ABA Standards for Lawyer Discip-

line and Disability Procedures, Section 813, the North Dakota Supreme Court levied a financial penalty against Conway for filing a complaint against Johnson with the Disciplinary Board of the Supreme Court. (First Trust's Petition for Rehearing, copies of complaints filed on January 3, 1987, March 22, 1987, and April 7, 1988)

9. In violation of the Eighth Amendment the North Dakota Supreme Court has imposed "unusual punishments", ten financial penalties against Conway to intimidate her from (1) exercising her right of due process of law and equal protection of the Probate Statutes of the North Dakota Century Code and (2) exposing fraud and felonies committed by a former North Dakota Supreme Court Justice, Johnson, attorney for First Trust.

In 3 decisions, all based on petitions illegally filed by Pearson in the name of "Eileen Conway, Petitioner".

Conway v. Parker, 250 N.W. 266 (N.D. January 27, 1977); Conway v. Parker, 287 N.W. 2d 465 (N.D. January 10, 1980; Conway v. Parker, 302 N.W. 2d 83 (April 3, 1981) the North Dakota Supreme Court praised Pearson for committing heinous crimes against Selma Kjorvestad, the Estate of Selma Kjorvestad and her beneficiary. (Reply Brief of Appellant, #870111, ps. 2 to 10) The North Dakota Supreme Court forced Conway, the Executrix of the Estate of Selma Kjorvestad, to pay Pearson $60,289.95 for crimes that bankrupted her estate. Contrary to the false statements of the justices of the North Dakota Supreme Court, Pearson has never been the attorney for either estate. The North Dakota Supreme Court vilified Conway as "intransigent", "contentious', quarrelsome" and "litigous" (for hundreds of petitions filed by Pearson in the name "Eileen Conway, Petitioner")for objecting

to massive federal and state income and estate tax fraud; obstruction of an accounting (for 14 years First Trust and Pearson claimed "the Supreme Court found no necessity for a full accounting." [App. #870111, p. 6]); the destruction of all files and records of the Estate of Selma Kjorvestad; the defiance by Pearson of 2 court orders to surrender records and files of the estate; two illegal secret lawsuits filed in two federal courts in the name of "Eileen Conway, Petitioner" in United States District Court and the U. S. Tax Court (Eileen Conway v. Internal Revenue Service, U. S. Tax Court, No. 11999,78) which resulted in the estates being forced to pay $417,868.13 in additional taxes, additional interest, penalties and attorneys' fees. Holding the Estate of Selma Kjorvestad hostage for 14 years in ligiation enriched First

Trust and Pearson but bankrupted the estate and its beneficiary. The North Dakota Supreme Court ruled that Conway cannot object to paying for Pearson's "expertise" because she benefited from it. When the North Dakota Supreme Court discovered that Pearson's so-called "expertise had bankrupted both estates, they reversed themselves in First Trust v. Conway, 345 N.W. 2d 838 (N.D. February 23, 1984); First Trust v. Conway, 375 N.W. 2d 160 (N.D. October 1, 1985); First Trust v. Conway, 395 N.W. 2d (N.D. October 28, 1986) and castigated Conway for not producing an account which they had blocked for 14 years. Conway worked day and night for 15½ years and spent $250,000.00 of her own money trying to get an accounting of her father's and mother's estates which is required by North Dakota law.

CONCLUSION

In two Wills signed on July 8, 1969 and December 3, 1972, Selma Kjorvestad designated her daughter, Eileen Conway, as her sole Executrix, in the event that her husband, Guy Kjorvestad, Sr. predeceased her. An older daughter who lived in her vicinity was not named in any capacity.

Conway has worked for 15 years to fulfill her sacred obligations to her father and mother. Conway appealed to:

1. Grand Forks County State's Attorney, Mr. Thomas Jelliff. (Conway's signature had been forged to 13 checks [App. #870111, p. 21) Mr. Thomas Jelliff was unable to help because he was under indictment himself for embezzlements from the office of the Grand Forks County State's Attorney.
2. Nelson County State's Attorney, Randy Deede, for forgeries in Nelson County.

3. North Dakota Attorney General, Allan Olson.

4. North Dakota Governor, Allan Olson.

5. North Dakota Attorney General, Nicholas Spaeth.

6. North Dakota Governor, George Sinner.

7. The American Bar Association

8. The U. S. Comptroller of the Currency.

9. The North Dakota Commission on Banking and Financial Institutions.

10. Federal Deposit Insurance Corporation.

The petitioner prays that the Writ of Certiorari will be granted.

88-708

Supreme Court, U.S.
FILED
OCT 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

EILEEN CONWAY,

Petitioner,

vs.

FIRST TRUST COMPANY,

Respondent

APPENDIX TO THE

PETITION FOR A WRIT OF CERTIORARI

Eileen Conway
Attorney Pro Se
2922 Germantown Road South
Germantown, Tennessee 38138
(901 754-1057)

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IN THE COUNTY COURT OF NELSON COUNTY

STATE OF NORTH DAKOTA

In the Matter of the Estate of)
)
Selma Kjorvestad, Deceased.)

FINDINGS OF FACT, CONCLUSIONS OF LAW

AND ORDER

The Petitioner, First Trust Company of North Dakota, filed a Final Accounting and Petition for Settlement and Distribution of the Estate which came on for hearing at the Nelson County Courthouse, Lakota, North Dakota, on September 21, 1984. The Petitioner appeared by Pam Anderson, its Probate Officer, and by J. Philip Johnson, its attorney. Lorraine Parker and Eileen Conway, heirs of the estate, appeared personally. Mrs. Conway filed and voiced various objections to the Petition and general status of the estate. Mrs. Parker made no objection.

Upon the testimony and exhibits presented and upon the records and files of

of this estate, the Court makes the following Findings of Fact:

FINDINGS OF FACT

1. This estate has been subject to a host of legal proceedings, hearings and appeals which have substantially delayed and extended this closing and which were, with few exceptions initiated by Mrs. Conway through a long succession of attorneys.

2. Selma Kjorvestad died testate on May 15, 1974. Petitioner is the duly appointed, qualified and acting Successor Personal Representative of the decedent's estate.

3. The previous Personal Representative of the estate, Eileen Conway and Lorraine Parker, were removed by Order of the District Court on June 19, 1980. The Petitioner was appointed Successor Personal Representative on September 4, 1980.

4. Purusant to Stipulation and Order of the Court, an interim distribution of

real estate and other assets constituting the bulk of the estate made to the heirs, Eileen Conway and Lorraine Parker, on or about February 21, 1979.

5. On December 6, 1982, the Court approved a Reconstructed Report and Account for the estate for the period January 23, 1978, to September 4, 1980.

6. An Inventory and Appraisement of all property of the estate known to the Successor Personal Representative has been filed and audits conducted by the Internal Revenue Service verifying the nature, extent and valuation of assets of the estate. Under previous Order of the Court Eileen Conway and Lorraine Parker were directed to deliver all assets of the estate in their possession and assist with marshalling any remaining assets.

7. Notice to Creditors of the decedent has been published as required by law and the time for presenting claims that arose

prior to the death of the decedent has expired.

8. All debts of the decedent and of the estate, and all expenses of administration thus far incurred, except those approved by separate Order upon hearing this date, and all taxes that have attached to or accrued against the estate have been paid.

9. The Petitioner filed a Final Account detailing receipts and disbursements in the administration of the estate from SEptember 4, 1980, totaling receipts of $249,172.24 and disbursements of $2.5,020.90 and the estate is in condition to be provisionally closed.

10. Allegations of misconduct on the part of attorneys, court officials, the Successor Personal Representative, and Lorraine Parker as made by Eileen Conway in documents filed with the Court are totally unsubstantiated by credible evidence. The administration of the Success-

or Personal Representative has proceeded in a competent and professional manner delayed only by the objections and proceedings initiated by Eileen Conway.

11. The decedent's will was previously admitted to probate in formal proceedings following notices required by law.

12. The decedent's will directs that the property remaining after payment of debts, claims, taxes, costs and expenses be distributed in equal shares to the surviving daughters of the decedent, Eileen Conway and Lorraine Parker.

13. The Stipulation and Interim Distribution of the parties on or about February 21, 1979, contemplated certain agtreed adjustments inthe respective distributions between the heirs.

14. The assets remaining in the estate consist of the following:

a. Miscellaneous jewelry of no substantial value.

b. Record title to the West 12 feet of Lot 3 and all of Lots 4, and 5, Block 32, White's First Addition to the City of Aneta, North Dakota;

c. Money market account in the amount of $34,151.34 as of April 30, 1984.

15. In view of the extended litigation history of this estate a reasonable reserve for additional litigation expense is appropriate.

CONCLUSIONS OF LAW

1. The Final Report and Account of the successor Personal REpresentative is approved and allowed.

2. A litigation reserve in the amount of $5,000.00 shall be retained by the Personal Representative for a period of one year from the date of entry of this Order and such account shall be applied toward any additional expenses of the Personal Representative and its attorneys arising from claims or litigation subsequent to such date. The balance shall be distrib-

in equal shares to Eileen Conway and Lorraine Parker upon expiration of that period.

3. The Personal Representative shall distribute to Eileen Conway record title West 12 feet of Lot 3 and all of Lots 4 and 5, Block 32, White's First Addition to the City of Aneta, North Dakota, together with one-half of the miscellaneous jewelry, as selected in the discretion of the Personal Representative, and one-half of the outstanding balance of the account.

4. The Personal Representative shall distribute to Lorraine Parker one-half of the miscellaneous jewelry, as selected in the discretion of the Personal Representative, and one-half of the outstanding balance of the account.

5. Distribution shall be deferred until expiration of the time for appeal or upon receipt of Writ and Waiver of Appeal by all interested parties.

6. The successor Personal Represent-

ative shall be finally discharged upon appropriate filing one year from the date of entry of this Order.

ORDER

Upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the account, as described, be allowed and that distribution upon the terms and conditions set forth in the Conclusions of Law be approved and made.

Dated this 2nd day of October, 1984

Ronald M, Dosch

County Judge

Findings of Fact, Conclusions of Law and Order, prepared by:

Law Offices of Pancratz, Yuill, Wold, Johnson & Feder, P.C. Professional Corporation, 414 Gate City Building, P. O. Box 1680, Fargo, North Dakota 58107, Telephone (701) 235-5515.

Filed by Clerk Oct-1 1985
Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Matter of the Estate of

Guy Kjorvestad, Sr. Deceased, and

In the Matter of the Estate of

Selma Kjorvestad, Deceased.

First Trust Company of

North Dakota

Petitioner and Appellee

v.

Eileen Conway

Respondent and Appellant

Civil Nos. 10,866-10867

Appeal from the County Court of Nelson County, Ronald M. Dosch, Judge.

AFFIRMED.

Opinion of the Court by Meschke, Justice.

Pancratz, Yuill, Wold, Johnson & Feder, Fargo, ND for petitioner and App-

ellee; argued by J. Philip Johnson.

Eileen Conway, 2922 S. Germantown Road, Germantown, TN 38138, respondent and appellant. appeared pro se.

Civil Nos. 10,866-67

First Trust Company v. Conway

MESCHKE, Justice.

This is the fifth chapter of a bitter dispute between two sisters about the substantial estates of their parents. Since we affirm orders approving the final account and distribution, this obessive ordeal ought to end.

Guy Kjorvestad died in 1973. His widow, Selma Kjorvestad, died in 1974. Their surviving daughters, Eileen Conway and Lorraine Parker, were the ultimate equal devisees of both estates and became co-representatives of them.

There followed years of "direct conflict between the two personal representatives." "failure of the represent-

atives to agree," "disputing," "Conway's intransigence [which]...continuously frustrated amicable settlement of those estates," and "unfounded rievance charges" against an attorney, as described in opinions in the first two unsuccessful appeal by Conway. Conway v. Parker, 250 N.W. 2d 266 (N.D. 1977)["Kjorvestad"] and Matt-of Estate of Kjorvestad, 287 N.W. 2d 465 (N.D. 1980)["Kjorvestad II"].

The sisters then each petitioned for removal of the other. The county court removed both and appointed First Trust Company of Fargo as the successor personal representative. Conway's appeal of these removal orders was dismissed as "substantially without merit." Matter of Estate of Kjorvestad. 304 N.W. 2d 83 (N.D. 1981) ["Kjorvestad III"] We observed that "the numerous times the court was called upon to resolve issues

resulting from the contentious attitude. if not quarrelsome behavior, existing between the corepresentatives certainly justified their removal. 304 N.W. 2d at 86. We pointed out that further litigation "would not serve to extend the time in which the estates are finally settled and would dissipate the funds of the estates to the detriment and prejudice of the estates." 304 N.W. 2d at 87.

Conway's contentiousness continued. In her fourth unsuccessful appeal, she challenged payment of fees to two attorneys and an accounting firm for services to the estates while the sisters were co-representatives.

First Trust Company of North Dakota v. Conway, 345 N.W. 2d 838 (N.D. 1984) [Kjorvestad IV"]

This is "Kjorvestad V."

Conway here appeals orders approv-

ing the final accounting of First Trust and ordering final distribution of the combined estates to Conway and Parker equally except for several undisputed and minor adjustments. She claims the county court erred:

(1) In excluding evidence at the hearing on the final account about the several years prior to First Trust becoming personal representative of the estates ("Reconstructed Account");

(2) In approving the final account of First Trust when it had not collected and accounted for all the assets of the estates;

(3) In approving the final account in her mother's estate without a full inventory, appraisal or notice to crediors; and

(4) In approving compensation and ex- expenses for First Trust and its attorney for services winding up the est-

ates.

Conway did not testify and called no witnesses. Her hearing evidence consisted only of her cross-examination of an officer of First Trust and 15 exhibits. These exhibits were summaries of items she claimed to be missing from safe deposit boxes, with copies of documents showing inventory of and access of boxes by herself and her sister between 1973 and 1978 (Exhibits A through I); a copy of an amendment to a judgment dated July 14, 1980 (Exhibit J); a copy of a prior order about funds of the estate in Ramsey County Nat;onal Bank and related correspondence of May 9, 1980 (Exhibits K and L); two pages from a transcript of a December 8, 1983, hearing in the estates (Exhibit M) an April 2, 1973, letter on the value of vehicles in the estate (Exhibit N); and a list of eight figures, without references,

totaling #38,836.67 and labeling "Missing Money" (Exhibit O).

Without any references to the record, Conway's "statement of facts" rails against her sister ("manic crime spree;" "embezzled money;" "embezzled bonds, cash, bank money-orders, checks;" "forged" signatures; "illegally redeemed securities and illegally moved $100,668.68 in cash assets;" "looted four safe deposit boxes [six];" "destroyed...monthly bank statements to cover-up additional forgeries;" "destroyed all records" and "embezzled approximately $39,000.00 from the estate"); rails against one prior attorney for the estate ("deceitfully misrepresenting himself;" "defied two court orders;" "felonies, fraud, forgeries, theft, embezzlements and a tangled web of falsified records to cover-up the wrong-doing;" 10 years

of trama [sic], threats, insults, verbal and non-verbal absue inflicted" by him or her; his "ruthless, vicious interference;" "conspired;" "concealed;" acted"illegally;" "also practiced deceit;" and "cover-up [of] massive fraud and felonies committed against the estate."); rails against one of her own lawyers ("concocted a scheme;" "lied;" particpated in a "fraudulent" reprt, "fraudulent accounting" [sic] and a "fraud scheme"; and rails against a prior accountant (falsified bank deposits to cover-up Parker's embezzlements;" "falsified grain sales;" and "falsified bank account ownersip.")

Her unsupported vilification extends to a county judge ("brutually assaulted Conway:" "cover up" of "irregularities;" "illegal court order;"), a district judge ("[f]alse statements;" "illegal Amendment to Judgment...to cov-

totaling #38,836.67 and labeling "Missing Money" (Exhibit O).

Without any references to the record, Conway's "statement of facts" rails against her sister ("manic crime spree;" "embezzled money;" "embezzled bonds, cash, bank money-orders, checks;" "forged" signatures; "illegally redeemed securities and illegally moved $100,668.68 in cash assets;" "looted four safe deposit boxes [six];" "destroyed...monthly bank statements to cover-up additional forgeries;" "destroyed all records" and "embezzled approximately $39,000.00 from the estate"); rails against one prior attorney for the estate ("deceitfully misrepresenting himself;" "defied two court orders;" "felonies, fraud, forgeries, theft, embezzlements and a tangled web of falsified records to cover-up the wrong-doing;" 10 years

er-up fraud;") and a clerk of court ("disoriented, hysterial behavior").

She proceeds with scathing accusations against First Trust and those associatiated with it. She rails that First Trust "breached their fiduciary duty," "committed perjury," "employed perjury, deception, misrepresentation and fraud to cover-up" assets, and "committed perjury." She accuses an officer of First Trust of making "thirteen false statements...to cover-up" prior "illegal" activities of a lawyer for the estate, and accuses a lawyer for First Trust of "making sixteen false statements ...to cover-up" such activities.

None of these vituperations are supported by any references to the record. Thus, Conway's presentation is lacking in evidence though lengthy in vilification.

We first summarize what is not involved. No specific claim is made of any mishandling by First Trust of property of the estates which is held. Rather, the principal issues relate to its accounting for funds and property for the period before it became responsible. No claim is made that the essential equal distribution of remaining assets on hand is incorrect. Rather, Conway disputes whether First Trust followed proper procedures and was propertly allowed compensation and expenses.

In this context, we address issues that Conway present pro se. Although she had had eleven differnt attorneys in the course of eleven years of strife, she was not represented by counsel at the hearing on the final account and she is not represented by counsel on this appeal. She has been told before that "the rules or statutes should not be

modified or applied differently merely because a party not learned in the law is acting pro se."

Kjorvestad III, 304 N.W. 2d at 85. We consider her arguments accordingly.

I. RECONSTRUCTED ACCOUNT

Pursuant to a settlement stipulation in open court, approximately twenty quarters of farm land and substantial cash were divided and distributed equally to Parker and Conway in 1977. Remaining grain on hand was ordered distributed in 1978.

On September 4, 1980, First Trust was appointed successor personal representative of both estates under supervised administration. Since the duties and powers of a personal representative commence upon appointment, S30.1-18-01, NDCC, the order appropriately specified that First Trust was "hereby absolved of any and all liabiltiy for any actions, transactions, errors or omissions of

Lorraine Parker and Eileen Conway in their capacity as co-executrices prior to the date of its appointment as successor personal representative." An accompanying order directed First Trust to "reconstruct as best it can a report and accounting of the estates...for the period from January 23, 1978, through September 4, 1980, and upon completion submit said report and accounting to the County Court for approval." Parker and Conway were ordered to account and to "deliver immediately to First Trust...all of the assets of each estate in their possession which have not heretofore been distributed or liquidated." They were further directed "to cooperate in every way possible to assist First Trust...in marshalling said remaining assets."

On November 17, 1982, First Trust filed a Petition for Approval of Reconstructed Account and Report for the per-

from January 23, 1978 to September 4, 1980. The petition showed that no report and account had been filed by either Parker or Conway, but listed checking accounts, certificates of deposit, mutual funds, and common stock of the estates which First Trust had gathered. This account itemized coins and jewelry found in a safe deposit box of the estate and described several town lots remaining in the name of Selma Kjorvestad.

Conway was notified of the hearing on this account. She "admits that there was a hearing on December 7, 1982, regarding First Trust's petition for approval of [this] reconstructed account and report." The hearing was not recorded or transcribed. Although Conway claims that First Trust withdrew its Reconstructed Account at the hearing, there is nothing to support this assertion.

The county court filed its order on December 8, 1982, which "allowed and settled" the Reconstructed Account. Contrary to Conway's claims, the order was not "secret." It was publically filed. Therefore, it is presumed regular and correct until shown otherwise by evidence. N.D.C.C. S31-11-03(15), (16) and (17); Midboe v. Midboe, 303 N.W. 2d 548, 551 (N.D. 1981).

Conway sees something sinsister in the fact that the order was dated and filed on the day following the hearing. We do not. It is not out of the ordinary for a judge to enter an order days or even weeks after a hearing, depending on the difficulties in the judge's deliaberaticn and schedule.

Conway's chief complaint is that she did not receive notice of entry of the order approving the Reconstructed Account. Therefore, she argues, she

should have been able to offer additional evidence relating to the Reconstructed Account at the hearing on the final account, but was foreclosed from doing so when the county judge ruled that he would "not allow any inquiries or presentation of evidence to matters that precede September 4, 1980." We believe that Conways' argument misconceives both the purpose of the hearing on the final account and the effect of lack of notice of entry of the order.

The purpose of the hearing on the final account was to consider First Trusts's conduct of the estates, not that of Conway and Parker. First Trust was not responsible for assets prior to September 4, 1980. First Trust's limited responsibility for accounting prior to September 4, 1980, was only "as best it can." It had no help from either Parker or Conway.

Since the hearing on the Reconstructed Account had been held, Conway was not necessarily entitled to present further evidence on it. Whether such evidence was material to the final account was largely within the sound discretion of the county court. Okken v. Okken Estate, 348 N.W. 2d 447, 451 (N.D. 1984); Walling Chemical Co. v. Bigner, 349 N.W. 2d 647 (S.D. 1984). Since only First Trust's handling of the remaining estates was involved in the hearing on the final account, the county judge did not abuse his discretion in ruling that evidence concerning the Reconstructed Account was not material.

Lack of notice of entry of an order after a hearing does not leave the hearing open-ended, as Conway assumes. She had notice of the hearing and participated in it. The hearing was held and the order was publicly filed. The county co-

urt no doubt had power to grant relief, if duly made; Rule 60(b), N.D.R. Civ. P. However, this does not mean that the subject of the hearing otherwise remained open for more evidence at later hearings. Ordinarily, the effect of lack of notice of entry of an order in probate in that the time for appeal remains open. See In the Matter of Alf J. Bo, 365 N.W. 2d 847, 850 (N.D. 1985) ("No notice of entry of the order has been served in this case. Therefore, the time for appeal technically has not yet commenced to run."); Matter of Estate of Erickson, 368 N.W. 2d 525, 528 (N.D. 1985)

The general theory as to all formal proceedings under the Probate Code is that "[a]n order is binding as to all who are given notice of the proceeding...'" S30.1-12-06, N.D.C.C. Conway clearly had prior notice of the proceeding. Cf. Matter of the Estate of Holmes,

559 p. 2d 344, 6 A.L.R. 4th 594 (Mont. 1979) (no notice of hearing and no notice of entry of order).

On the other hand, in supervised administration such as these, interim orers may be issued at any time; N.D.C.C. S30.1-16-05. Editorial Board Comment to his section of the Uniform Probate Code makes it clear that a supervised administration is considered a "single proceeding," requiring notice to commence and to close, and goes on to observe that provision for notice of interim orders was left to be covered by court rule, although"[a] demand for notice under section 30.1-13-04 would entitle any interested person to notice of any interim order which might be made in the course of supervised administration;" 6 N.D.C.C. at p. 124. (Compare S30.1-12-07, N.D.C.C.; "Unless supervised administration as described in chapter 30.1-16

is involved, each proceeding before the court is independent of any other proceeding involving the same estate;..." Also compare S30.1-16-01, N.D.C.C., on the nature of proceedings in supervised administration.) Conway makes no showing that she filed a demand for notice of entry of orders, as contemplated by S30.1-13-04, N.D.C.C. In any event, that section goes on to provide: "The validity of an order which is issued or filing which is accepted without compliance with this requirements shall not be affected by the error...."

We observe that, unless contrary to or inconsistent with the Probate Code, "the rules of civil procedure, including the rules concerning vacation of orders and appellate review, govern formal proceedings under this title;" S30.1-02-04, N.D.C.C. (emphasis supplied). See Matt-

er of Estate of Bieber, 256 N.W. 2d 879 (N.D. 1977).

Rule 77(d), N.D.R.Civ.P., is the rule of civil procedure which deals with notice of entry. It says:

> "(d) Notice of Entry of Judgment Served. Within 10 days after entry of judgment in an action in which an appearance had been made, notice of such entry, together with a copy of such judgment or a general description of the nature and amount of relief and damages thereby granted, shall be served by the prevailing party upon the adverse party."

While this rule, unlike its Federal counterpart, seems to require notice of entry of only a judgment, we have defined "judgment"bradly as "a judicial determination on matters submitted to a ccurt for decision which fixes the rights and duties of the parties." Matter of Estate of Raketti, 340 N.W. 2d 894, 898 (N.D. 1983). But, we do not need to decide in this case whether Rule 77(d), N.D.R.Civ.P., requires notice of entry of an interim

order in a supervised administration. For this case, it is enough to point out that because of express provisions of other rules of civil procedure, the effects of failure to give notice of entry of any order are that it extends the time periods, both for relief from an order under Rule 60(b), N.D.R.Civ.P., and for appeal under Rule 4(a), N.D.R. App.P. The time periods of both of these perinent procedural rules are expressly tied to service of ntoice of entry or judgment involved.

The record clearly shows that Conway and her then counself knew by December, 1983, that the order approving the Reconstructed Account was on file. Conway made no effort thereafter to seek relief from that order.

It is well established that an interlocutory order may be reviewed on appeal from the final order or judgment in

the matter. Suburban Sales v. District Court of Ramsey, 290 N.W. 2d 247, 251 (N.D. 1980); United Hospital v. Hagen, 285 N.W. 2d 586 (N.D. 1979)

We conclude that an interim order in supervised administration, pursuant to a hearing upon notice but where notice of entry is not given, stands unless duly vacated pursuant to the rules of civil procedure. Further, it is subject to appellate review as an interlocutory order, upon appeal from a final order completing settlement of the estate. See S30.1-16-05 and 30.1-21-01, N.D.C.C.[1] Thus, on this appeal of the order approving the final account and final distribution, the question is whether there was any error in the interim order approving the Reconstructed Account.

But, Conway's only showing is that she lacked notice of the order approving the Reconstructed Account. Although she

was represented by counsel at the hearing on the Reconstructed Account, there is no transcript. She took no steps to have a statement of the evidence or proceedings "from the best available means" prepared for this appeal; see Rule 10(f), N.D.R.App.P. Nor, did she make an offer of proof when the county judge limited her evidentiary presentation at the final account hearing. Thus, we have neither evidence nor record to reconsider Conway's complaints about deficiencies in the Reconstructed Account. Therefore, the record of this appeal fails to show any error in the Reconstructed Account.

We have often pointed out that this court will not review claimed errors where there is no record and no offer of proof by which the claim of error can be properly evaluated. Cargill, Inc.

v. Davanaugh, 238 N.W. 2d 133 (N.D. 1975); Jore v. Saturday Night Club, Inc., 277 N.W. 2d 889 (N.D. 1975); See Rule 103(A), N.D.R.Ev.: "Error may not be predicated upon a ruling which...excludes evidence unless a substantial right of the party is affect, and...the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." (emphasis supplied).

We have studied the transcript of the hearing on the final account to consider whether the substance of evidence excluded was apparent from the context and to assess whether any substantial right of Conway was affected by the exclsuion of evidence at that hearing. The substance of evidence excluded is not apparent from the context, as no offer of proof was made, we find no error. Halverscn v. Pet, Inc., 261

N.S. 2d 887, 894 (N.D. 1978)

For example, Conway asserted in her cross-examination that "there is still grain in the elevator belonging to Guy Kjorvestad," implying that the Reconstructed Account is erroneous for omitting grain. No specific elevator or warehouse receipts were identified. The Reconstructed Account by First Trust recited that its investigation indicated "grain was distributed to the heirs" prior to the appointment of First Trust and concluded, "[n[o grain on hand belonging to the estate." The record shows that on July 13, 1978, (which was after division and distribution of the farm land), the county court ordered that "[t]he grain presently on hand owned by the estates...shall be distributed in equal shares to the heirs, Eileen Conway and Lorraine Parker. The mechanics of distribution shall be that all grain presently

held by the estates shall be delivered to the elevators 50 per cent in the name of each heir, with documents of title being delivered by the respective elevators for each heirs"share." Thus, the insinuations Conway makes about grain on hand are contrary to the record. She may not have availed herself to an existing order of distribution of grain, but if she has not, that is not a responsibility of First Trust nor a deficiency in its Reconstructed Account. Furthermore, Conway did not acccunt for any grain on hand at the time she was removed. This contention plainly lacks substance.

As another example, Conway maintains that the Reconstructed Account fails to show all the coins and items originally inventoried in safe deposit boxes. What First Trust is expected to do about missing items is not spelled out. Conway offered no evidence as to

the present whereabouts of any missing items. This lack of proof and her own failure to account demonstrate that her effort to place responsibility on First Trust to further account for a period prior to its appointment is without merit.

The County Court's order approving the Reconstructed Account determined that neither Parker or Conway" have complied with the Judgment of the District Court, dated June 19, 1980, directing either of [sic] both of them to file a complete report and account as to the assets" of the Kjervestad estates. Conway does not dispute this. She cannot complain about First Trust's reconstructed accounting when she had the primary duty but ignored it.

Absent credible evidence to consider the conjectures Conway makes, we conclude that no error has been shown in the order

allowing the Reconstructed Account. We also conclude that there was no error in the county court's discretionary ruling excluding evidence about the Reconstructed Account at the hearing on final account.

II. COLLECTION OF ASSETS

Conway repeats similar complaints about missing assets by insisting that First Trust had "a duty to fully investigate and determine if any assets were not accounted for, and alos negate the possibility that fraud was committed." She also makes various vague claims as to missing funds, ranging from $39,000 to $882,740, but there is no coherent identification of where or when these funds allegedly disappeared. Conway castigates First Trust for not doing enough to collect these assets which she believes are missing. She points out that a successor Personal Representative "has the same power and duty as

as the original personal representative complete the administration and distribution of the estate as expeditiously as possible...N.D.C.C. S30.1-18-16.

Conway cites Miller v. First National Bank of Linton, 62 N.D. 122, 242 N.W 124 (1928) and Dolphin v. Peterson, 63 N.D. 792, 249 N.W. 784 (1933) to the effect that an executor of an estate has a duty to account for all property belonging to the estate. She also cites several cases from other states which imply that successor fiduciaries must account "for the entire period of time in question rather than simply just after their appointment." Those may sound general principles, but have no application to the circumstances of this case.

Our Probate Code specifically provides:

> "Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated." N.D.C.C.S30.1-17-13 (emphasis supplied).

First Trust's duties were appropriately otherwise ordered as to responsibility for prior actions of Parker and Conway.

"The duties and pwoers of a personal representative commence upon his appointment." N.D.C.C. S30.1-18-01. When appointed, First Trust was expressly absolved of any and all liability for any actions, transactions, errors or omissions of...Parker and...Conway...prior to the date of its appointment..." This order was congruent with the Probate Code which allows a personal representative to leave property with those who are "presumptively entitled thereto unless necessary for purposes of administration; N.D.C.C. S30.1-18-09.

Prior filed accountings and prior

distribution to the sisters demonstrate that First Trust was not obligated to collect all assets of the estates. Its responsibility extended only to remaining property of the estates that actually came into its hands. We perceive no basis to impose fiduciary responsiblity on First Trust for assets that were never turned over to it by Conway or Parker.

Conway argues that it is sufficient to impose a greater fiduciary duty on First Trust that it "had been alerted that asserts [sic] may be missing...and that there may have been wrongdoing on the part of a previous coexecutrix." Mere possibility of misconduct by a prior fiduciary is not alone sufficient reason to hold a successor fiduciary responsible for it.

The record is barren of evidence showing that present whereabout or custody of anh specific missing assets.

Conway herself wholly failed to account for any. Under the circumstances we conclude that First Trust did not have any fiduciary duty to Conway in collecting assets of the estates.

III. PERFORMANCE OF DUTIES

Conway insists that First Trust failed to perform its statutory duties because no complete inventory and appraisal in her mother's estate was ever made, and no notice to creditors was ever given in that estate. In doing so, she insists that procedural provisions about inventory, appraisal and notice to creditors of the old Probate Code in effect when her mother died in 1974 should apply.

Our current Probate Code was adopted from the Uniform Probate Code in 1973, effective July 1, 1975. N.D.C.C. S30.1-35-01(1). It specifically provided:

> "b. The title applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except

> to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this title." N.D.C.C. S30.1-35-01(2)

The old Probate Code, chapters 30-13, 30-15, and 30-20, was simultaneously repealed. 1973 S.L., ch. 257, S82.

We find no procedure from the old Probate Code which should be applicable in this decade to First Trust "in the interest of justice." Nor, do we find any procedure in the new Probate Code which is infeasible of application to these estates.

Conway points out that Kjorvestad I, 250 N.W. 2d at 276, approved application of ol Probate Code procedures to those disputes in 1977. In that decision this Court said: "Application of former law was in the discretion of the trial court and we do not find an abuse of that discretion...." This prior discretionary

application of old procedures did not fix procedural rights for the eternity of these estates. It is axiomatic that procedural modes, as dist inguished from substantive rights, are not vested and are subject to repeal, modification or change. Kessler v. Thompson, 75 N.W. 2d 172, 178 (N.D. 1956).

The lack of formal inventory and appraisement in this disrupted estate is not significant in view of the extensive tax filings and litigation, which First Trust concluded, and in view of the prior major distributions in these estates before First Trust was appointed to wind them up. Nothing supports imposing a greater burden upon First Trust than upon Conway herself. Again, her own failure to cause inventory and appraisal while she was responsible, as well as her own failure to account to her successor, demonstrates the

the lack of merit in her claim that First Trust failed to perform statutory duties.

As to Conway's complaint that notice to creditors had not been given in her mother's estate, we observe that this saved needless expense to the estate since all creditors' claims against the estate were long since barred by the lapse of time in this estate. N.D.C.C S30.1-19-03.

We hold that First Trust satisfactorily performed its duties of administering and distributing the remaining balance of Mrs. Kjorvestad's estate "as expeditiously as possible."

IV. ADDITIONAL COMPENSATION

Conway argues that it was "clearly erroneous" to award compensation to First Trust because total fees paid to personal representative exceed amounts authorized by the old Probate Code and be-

cause First Trust failed "to perform its statutory duties." Our consideration of these same issues earlier in this opinion dispose of these contentions.

Conway complains that administrative costs have been excessive. There is no recognition by her of her own obsessive role in this. We observe that, in addition to the direct costs to these estates of her litigation, she was reimbursed a total of $41,054.25 in expenses after her removal, when her sister waived any such claim. Thus, any excessiveness in administration costs cannot be attributed to First Trust.

First Trust insists that it has done "our best in a very difficult situation," and suggests that "some bonus...in the nature of combat pay be in order." Pointing to Conway's repeated litigation over payment of fees and expenses in past proceedings in these estates, see Kjorvestad

I, II, and Iv, First Trust correctly observes that "Conway has no obvious objection to litigation, except for payment of its cost." Indeed, Mrs. Conway has paid no heed to this court's prior warnings about dissipating funds of the estates through rancorous litigation; see Kjorvestad II, 287 N.W 2d at 468 and Kjorvestad III. 304 N.W. 2d at 87.

Without cooperation from Conway, First Trust collected remaining assets and funds (some of which had been in non-interest bearing status for many months), completed and filed amended estate tax returns, prosecuted and resolved complex estate tax litigation in the federal courts, filed fiduciary income tax returns, prepared the Reconstructed Account, and prepared and submitted its final account and petition for distribution. It appears that First Trust diligently sough to dispatch its duty to complete the

administration of both estates as "expeditiously as possible" under the circumstances.

The Probate Code authorizes reasonable compensation to a personal representative and to those properly employed to assist in administration of any estate, including reasonable attorney's fees to defend or prosecute any proceedings in good faith. N.D.C.C. S30.1-18-19, 30.1-18-21 and 30.1-18-20. The county court approved the compensation as reasonable. Under N.D.R.Civ.P., Rule 52(a) we are required to affirm the findings of the county court on compensation unless they are "clearly erroneous." No evidence was submitted by Conway to dispute the services itemized or the hourly rates charged. We conclude that the county court's approval of compensation was not erroneous.

V. COSTS OF THIS APPEAL

First Trust suggest that we consider assessing its costs and attorney's fees on this appeal against Conway's share of the estates as an appropriate method for dealing with her unrestrained and unsubstantiated accusations. We agree.

We have fully examined the record and carefully considered her issues to satisfy ourselves that there was no serious symptom in her legal hypochrondria. We found non. We conclude that her sweeeping accusations are unreasonable and that her claims of misconduct by First Trust are entirely unsubstantiated.

This public airing of her private obsession ought to be at her personal expense. As the Nebraska Supreme Court recently observed: "It seems to us that the probate code should not be construed

so as to permit one heir or devisee to finance his or her lawsuit against another heir or devisee out of the funds of the estate..." In Re Estate of Keating, 371 N.W. 2d 107, 109 (Nb. 1985).

Accordingly, we exercise our powers under Rule 38, N.D.R.App.P., and direct an award accordingly. We order that First Trust be paid its reasonable compensation, attorney's fees and costs on this appeal out of Conway's share of the estate only, rather than from the total estate as has been done heretofore.

VI. CONCLUSION

We hold that there is no evidence that the Reconstructed Account was erroneous and we hold that the county judge did not err in excluding further evidence concerning that prior period at the later hearing on the final account. We also hold that First Trust satisfactorily performed its fiduciary duties to

collect assets and account for them.

We affirm the Order Approving the Reconstructed Account, the Order Approving the Final Account and Directing Distribution, and the County Court's order approving compensation and expenses to First Trust and its attorney. We direct that First Trust be paid its reasonable compensation, attorney's fees and costs on this appeal, as determined and approved by the county court, from the remaining share of the estates distributed to Conway.

Herbert L Meschke

Vernon R. Pederse S.J

Gerald W. VandeWalle

H. F. Gierke III

Ralph J. Erickstad, C.J.

Pederson, S. J., sitting in place of Levine, J., disqualified.

[1] An interim order in supervised administration may also be reviewed upon direct appeal when there is an express determination that there is no just reason for delay and an express direction for its entry as final judgment under Rule 54(b), N.D.R.Civ.P.,: Kjorvestad IV, 345 N.W. 2d at 841-842.

File Nos. 10,866-10,867

STATE OF NORTH DAKOTA
ss
IN THE SUPREME COURT

Appeal from the (County) Court of Nelson County

IN THE MATTER OF THE ESTATE OF
GUY KJORVESTAD, SR. DECEASED, AND
IN THE MATTER OF THE ESTATE OF
SELMA KJORVESTAD, DECEASED.

First Trust Company of
North Dakota,

Petitioner and Appellee

v.

Eileen Conway,

Respondent and Appellant

This appeal having been heard by the Court at the June, 1985 term before: The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Gerald W. VandeWalle, the Honorable H.F. Gierke III, the Honorable Herbert L Meschke, the Honorable Vernon R. Pederson, Surrogate Judge, Justices;

and the Court having considered the appeal, it is ordered and adjudged that the ORDERS of the court below be and the same ARE HEREBY AFFIRMED.

IT IS FURTHER ORDERED AND ADJUDGED THAT THE COSTS ON APPEAL WILL BE ASSESSED IN ACCORDANCE WITH THE OPINION FILED HEREWITH.

Dated October 1, 1985

Attest: Luella Dunn

Clerk of the Supreme Court

By the Court:

Ralph J. Erickstad

Chief Justice

North Dakota Supreme Court

IN THE COUNTY COURT OF NELSON COUNTY

STATE OF NORTH DAKOTA

In the Matter of the Estate)
)
of Selma Kjorvestad, Deceased.)

AMENDED FINDING OF FACT, CONCLUSIONS OF LAW AND ORDER UPON REMAND

The Petitioner, First Trust Company of North Dakota, filed a Final Accounting and Petition for Settlement and Distribuation of the Estate which came on for hearing at the Nelson County Courthouse, Lakota, North Dakota, on September 21, 1984. The Petitioner appeared by Pam Anderson, its Probate Officer, and by J. Philip Johnson, its attorney. Lorraine Parker and Eileen Conway, heirs of the estate, appeared personally. Mrs. Conway filed and voiced various objections to the Petition and general status of the estate. Mrs. Parker made no objections.

Findings of Fact, Conclusions of Law and Order allowing the final account and

approving distribution of the remainder of the estate were entered October 2, 1984. Eileen Conway appealed from that Order to the North Dakota Supreme Court which affirmed the Order, subject to instructions contained in its Opinion dated October 1, 1985. Petition for Rehearing was denied October 28, 1985.

Upon the testimony, exhibits and affidavits presented and upon the records and files in this estate, the Court makes the following Amended Findings of Fact:

FINDINGS OF FACT

1. The estate has been subject to a host of legal proceedings, hearings and appeals which have substantially delayed and extended this closing and which were, with few exceptions, initiated by Mrs. Conway through a long succession of attorneys.

2. Selma Kjorvestad died testate on May 15, 1974. Petitioner is the duly appointed, qualified and acting successor Per-

sonal Representative of the decedent's estate.

3. The previous Personal Representatives of the estate, Eileen Conway and Lorraine Parker, were removed by Order of the District Court on June 19, 1980. The Petitioner was appointed successor Personal Representative on September 4, 1980.

4. Pursuant to Stipulation and Order of the Court, an interim distribution of real estate and other assets constituting the bulk of the estate were made to the heirs, Eileen Conway and Lorraine Parker, on or about February 21, 1979.

5. On December 6, 1982, the Court approved a Reconstructed Report and Account for the estate for the period January 23, 1978 to September 4, 1980.

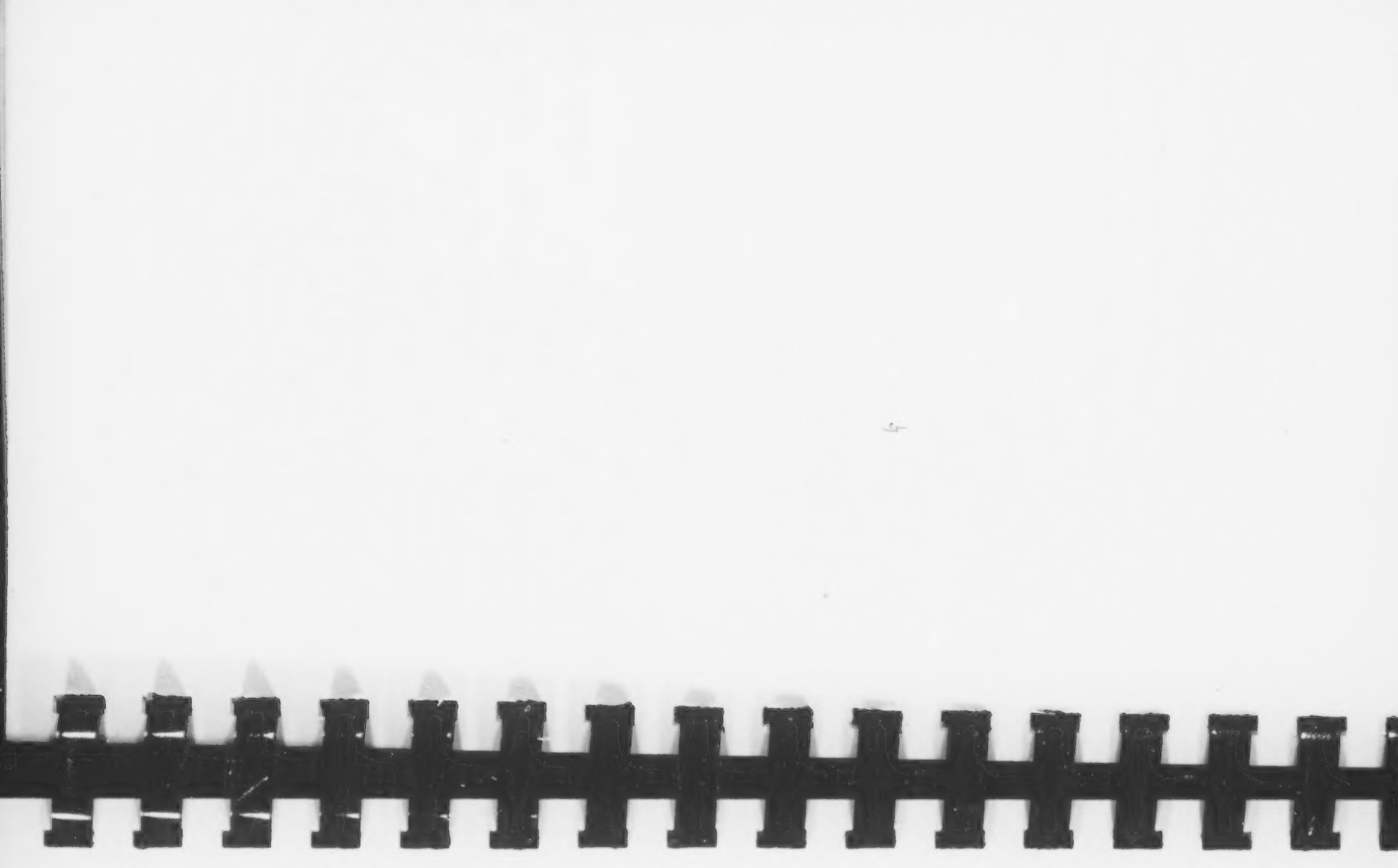
6. An Inventory and Appraisement of all property of the estate known to the successor Personal Representative has been filed and audits conducted by the

Internal Revenue Service verifying the nature, extent and valuation of assets of the estate. Under previous Order of the Court, Eileen Conway and Lorraine Parker was directed to deliver all assets of the estate to their possession and assist with marshalling any remaining assets.

7. Notice to Creditors of the decedent has been published as required by law and the time for presenting claims that arose prior to the death of the decedent has expired.

8. All debts of the decedent and of the estate, and all expenses of administration thus far incurred, except those approved this date, and all taxes that have been attached to or accrued against the estate have been paid.

9. The Petitioner filed a Final Account detailing receipts and disbursements in the administration of the estate from September 4, 1980, totaling receipts of



and disbursements of $215,020.90 and the estate is in a condition to be closed.

10. Allegations of misconduct on the part of attorneys, court officials, the successor Personal Representative and Lorraine Parker as made by Eileen Conway in documents filed with the Court are totally unsubstantiated by credible evidence. The adminsitration of the successor Personal Representative has proceeded in a competent and professional manner delayed and deterred only by the objections and proceedings initiated by Eileen Conway.

11. The decedent's will was previously admitted to probate to formal proceedings following notices required by law.

12. The decedent's will directs that the property remaining after payment of debts, claims, taxes, costs and expenses be distributed in equal shares to the surviving daughters of the decedent, Eileen Conway and Lorraine Parker.

13. The Stioulation and Interim Distribution of the parties on or about February 21, 1979, contemplated certain agreed adjustments in the respective distributions between the heirs.

14. The assets remaining in the estate consist of the following:

a. Miscellaneous jewelry of no substantial value.

b. Record title of the West 12 feet of Lot 3 and all of Lots 4 and 5, Block 32, White's First Addition to the City of Aneta, North Dakota;

c. Money market account in the amount of $34,151.34 as of April 30, 1984.

15. In view of the extended litigation history of this estate a reasonable reserve for additional litigation expenses is appropriate.

16. Necessary and reasonable attorney's fees based upon hourly charges, and appeal costs, were incurred by Pancratz,

Yuill, Wold, Johnson & Feder, attorneys for the Personal Representative, arising from the appeal of the Orders in this and the companion estate in the amount of $4,433.36.

17. Necessary and reasonable Personal Representative's fees based upon customary charges were incurred as a result of the appeal of Order in this and the companion estate in the amount of $4,306.53.

CONCLUSIONS OF LAW

1. The Final Report and Account of the successor Personal Representative is approved and allowed.

2. A litigation reserve in the amount of $5,000.00 shall be retained by First Trust Company of North Dakota for a period of one year from the date of entry of this Order and such account shall be applied toward any additional expenses of First Trust Company and its attorneys

arising from claims of litigation relating to the estate subsequent to such date. The balance shall be distributed in equal shares to Eileen Conway and Lorraine Parker upon expiration of that period.

3. The attorneys' fees and Persoanl Representative's fees and costs incurred by First Trust Company of North Dakota are approved for payment from share of the Guy and Selma Kjorvestad Estates distributable to Eileen Conway. First Trust Company may allocate such payments between the estates as it deems reasonable.

4. The Personal Representative shall distribute to Eileen Conway record title to the West 12 feet of Lot 3 and all of Lots 4 and 5, Block 32, White's First Addition to the City of Aneta, North Dakota, together with one-half of the miscellaneous jewelry, as selected in the discretion of the Personal Representative, and one-half of the outstanding balance

of the account, less approved fees and costs.

5. The Personal Representative shall distribute to Lorraine Parker one-half of the miscellaneous jewelry, as selected in the discretion of the Personal Representative, and one-half of the outstanding balance of the account.

6. The successor Personal Representative shall be discharged from all claims or demand of any interested person as to matters relating to the accounting and distribution of this estate as determined by this Order.

7. First Trust Company of North Dakota shall be discharged and released from its duties as Personal Representative, subject only to distribution as provided under this Order.

AMENDED ORDER

Upon the foregoing Amended Findings of Fact and Conclusions of Law, it is

ORDERED that the account, as described, be allowed and that distribution and discharge upon the terms and conditions set forth in the Conclusions of Law be authorized and approved.

Dated this 5th day of December, 1985.

Ronald M. Dosch

County Judge

Amended Findings of Fact, Conclusions of Law and Order Upon Remand, prepared by: Law Offices of Pancratz, Yuill, Wold, Johnson & Feder, P.C., Professional Corporation, 414 Gate City Building, P. O. Box 1680, Fargo, North Dakota 58107. Telephone (701) 235-5515

Filed by Clerk October 28, 1986
Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

IN THE MATTER OF THE ESTATE OF
GUY KJORVESTAD, SR., DECEASED, AND
IN THE MATTER OF THE ESTATE OF
SELMA KJORVESTAD, DECEASED.

First Trust Company
of North Dakota,

Petitioner and Appellee

v.

Eileen Conway

Respondent and Appellant

Civil Nos. 11, 173-11,174

Appeal from the County Court of Nelson County, Northeast Central Judicial District, the Honorable Ronald M. Dosch, Judge.

APPEAL DISMISSED.

Opinion of the Court by Meschke, Justice.

Pancratz, Yuill, Wold, Johnson & Feder, P. W. Box 1680, Fargo, ND 58107, for petitioner and appellee; argued by J. Philip Johnson.

Eileen Conway, 2922 S. Germantown Road, Germantown, TN 38138, for respondent and appellant; appeared pro se.

First Trust Co. v. Conway

Civil Nos. 11, 173 and 11, 174

MESCHKE, Justice.

In the Matter of Estate of Kjorvestad, 375 N.W. 2d 160, 171 (N.D. 1985), ["Kjorvestad V"] we deem Eileen Conway's fifth appeal frivolous and directed "that First Trust be paid its reasonable compensation, attorney's fees and costs on [the] appeal as determined and approved by the county court, from the remaining share of the estates distributed to Conway." Upon remand, the county court approved payment of $6,739.89 in compensation, attorney's fees and costs for the

appeal. Conway has appealed again, making this "Kjorvestad VI[1]. We dismiss her appeal because the order was entered without notice and because Conway did not seek a hearing before appealing.

After remand of Kjorvestad V, counsel for First Trust simply mailed an affidavit and a proposed "Amended Order Upon Remand" to County Judge and to Conway. The affidavit listed First Trust's compensation, attorney's fees and costs for that appeal. The Amended Order upon Remand was the same as that affirmed on appeal, except that findings were added about the amount of compensation, attorney's fees and costs for the appeal and that amount was ordered paid from Conway's share of the estates.

Unfortunately, counsel for First Trust did not give notice of hearing to Conway under S10.1-18-21. Without a hear-

ing, the county court promptly entered the Amended Order Upon Remand on December 5, 1985. On December 10, 1985, counsel for First Trust notified Conway of entry of the Amended Order Upon Remand, but did not give notice of taxation of costs under N.D.Civ.P. 54(e), as perhaps might have been done. See City of Grand Forks v. Henderson, 297 N.W.2d 450, 451 (N.D. 1980) ("Costs including attorney's fees as allowed by law are taxed as part of the judgement.") Conway appealed on February 1, 1986, arguing that she was deprived of a hearing on the reasonableness of the amounts of compensation and attorney's fees.

On our own initiative, we consider whether an appeal is authorized by statute. Olson v. Job Service North Dakota, 379 N.W.2d 285 (N.D. 1985)

N.D.C.C., S28-27-02, which describes the orders reviewable by this court,

declares in subsection 7:

> "An order made by the district court or judge thereof without notice is not appealable, but an order made by the district court after a hearing is had upon notice which vacates or refuses to set aside an order previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice."

This precludes appeal of an order entered without notice or hearing "until such time as the judge who made the order has a chance to reconsider his decision in an adversary proceeding." Beck v. Smith, 296 N.W.2d 886, 888 (N.D. 1980), See also Production Credit Association of Minot v. Schlak, 383 N.W.2d 826, 828 (N.D. 1986). Because this Amended Order Upon Remand was entered without notice or hearing, it is not appealable and we dismiss the appeal.[2]

Conway may yet seek a hearing on the reasonableness of the amounts of compensation, attorney's fees and costs.[3]

N.D.C.C. S30.1-18-18 provides:

> "After notice to all interested persons, or on petition of an interested person, or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment adviser, or other specialized agent or assistant, the reasonableness of the compensation determined by the personal representative for his services may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds." (emphasis supplied)

If Conway seeks a hearing, the only issue to be considered is the reasonableness of the amounts paid for that appeal, Conway cannot continue to reargue and relitigate cumulative amounts of compensation and attorney's fees for all the prior proceedings, as she tried to do on this appeal. "[A]t some point, there must be an end to litigation so that the parties may go about their normal business." Lang v Bank of North Daota, 377 N.W. 2d 575, 579 (N.D. 1985)

We caution Conway that First Trust is entitled to additional reasonable compensation and fees for its participation in any further hearing which she obtains to consider the reasonableness of amounts charged to her, unless she convinces the county court that the amounts allowed were unreasonable. For example, see Jones v. MacMillan Bloedel Containers, Inc., 685 F2d 236 (Ith Cir. 1982). Conway cannot continue to impose her obsessions on others without consequence. To avoid perpetuation of this dilemma, we suggest that the county court make any award therefore at the hearing, when and if it is held.

We want to end this ordeal. If Conway seeks a further hearing and further appeals (unless she should prevail on that appeal), we will direct First Trust to submit its verified and itemized statements for such eompensation, fees and

costs to this court for our action under N.D.R.App.P. 27. While this is not our usual approach to award attorney's fees on appeal, see Wolfe v. Wolfe, 391 N.W. 2d 617, 621 (N.D. 1986) (Levine, J.,concurring specially), we view it as necessary to bring finality to this affair. Compare In re Nordbrock, 772 F. 2d 397, 401 (8th Cir. 1985)(prevailing party to submit verified and itemized bill for attorney's fees and expenses for Court of Appeal's review and approval within fifteen days).

First Trust seeks compensation and attorney's fees for this appeal from Conway under N.D.R.App.P. 38, but under the circumstances, we make no such award. See Ginsburg v. Ginsburg, 352 F2d 337, 338 (9th Cir. 1965).

This appeal is dismissed.

Herbert L. Meschke

Vernon R. Pederson

Gerald W. VandeWalle

H. F. Gierke III

Ralph J. Erickstad, C. J.

PEDERON, S.J., sitting in place of LEVINE, J., disqualified.

[1]See Conway v. Parker, 250 N.W. 2d 266 (N.D. 1977); Matter of Estates of Kjorvestad, 287 N.W.2d 465 (N.D. 1980) Matter of Estates of Kjorvestad, 304 N.W. 2d 83 (N.D. 1980); First Trust Company of North Dakota v. Conway, 345 N.W. 2d 838 (N.D. 1984); and Matter of Estate of Kjorvestad, 375 N.W.2d 160 (N.D. 1985)

[2]First Trust earlier moved to dismiss this appeal on other ground, which we denied. This issues was not raised at that time.

[3]First Trust suggest that Conway failed to timely move pursuant to N.D.R.Civ.P. 52(b) that the county court amend its findings. Since it is palin that Conway can oftain a hearing under N.D.C.C. S30.1-18-21 when she was notified of court approval of the amounts of eompensation and attorney's fees, Rule 52(b) is not applicable.

File Nos. 11,173-11,174

STATE OF NORTH DAKOTA
ss

IN THE SUPREME COURT

Appeal from the (County) Court of Nelson

IN THE MATTER OF THE ESTATE OF

GUY KJORVESTAD, SR., DECEASED, AND

IN THE MATTER OF THE ESTATE OF

SELMA KJORVESTAD, DECEASED.

First Trust Company of

North Dakota, Petitioner and Appellee

v.

Eileen Conway Respondent and Appellant

This appeal having been heard by the Court at the September, 1986 term before:

The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Gerald W. Vande-Walle, the Honorable H.F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Vernon R. Pederson, Surrogate Judge, Justices:

and the Court having considered the appeal, it is ordered and adjudged that the

APPEAL FROM THE (order) of the court below be and the same is hereby DISMISSED. It is further ordered and adjudged that Neither Party recover costs and have and disbursements on this appeal, to be taxed and allowed in the court below.

Dated October 28, 1986.

Attest: Luella Dunn

Clerk of the Supreme Court

Ralph J. Erickstad

Chief Justice

North Dakota Supreme Court

IN COUNTY COURT OF NELSON COUNTY

STATE OF NORTH DAKOTA

In the Matter of the Estates of Guy Kjorvestad and Selma Kjorvestad, Deceased.

FINDINGS AND ORDER APPROVING FEES

The Court, upon its review of the testimony presented and exhibits received at a hearing February 10, 1987 on the petition of First Trust Company of North Dakota, as Personal Representative of the Estates of Guy Kjorvestad and Selma Kjorvestad, for approval of Personal Representative and attorney's fees makes the following findings:

1. Petitioner's exhibits 1, 2, 3, and 4 represent a fair and accurate summary of the expenses incurred and services rendered in the administration of the above referenced estates. The exhibits sufficiently indicate the amounts due and owing the Personal Representative and the attorney. The Court will require no fur-

er documentation of the same.

2. The testimony of Pamela Anderson as an employee of First Trust Company of North Dakota familiar with the instant estates as well as experienced in the administration of other estates is accurate and trustowrthy.

3. The record is void of any indications that the billings are unreasonable, and, based on Pamela Anderson's testimony that the billings were computed in the usual manner for estate practices, the Court hereby approved the same.

4. This Court deems it necessary, in the face of the history of continuing litigation in this case, to authorize the Personal Representative to pay for future services of the Personal Representative and the attorneys based on the same criteria the Court used to allow payment of the fees requested in the January 1987 petition of the Personal Representative.

Said crieria to include (but not be limited to): common accounting practices used by persons administering estate affairs and appropriate hourly rates of attorneys considering the expertise necessary.

5. The Court reviewed numerous North Dakota Supreme Court cases relative to the Kjorvestad estates and finds Attorney Johnson's request for costs and fees incurred in his defense of the current and any future complaints and investigations of the Disciplinary Board of the Supreme Court to be appropriate and timely. Dr. Eileen Conway's propsity to spur litigation and inquiries is evident. The cost of defending such claims should not rest on those persons who successfully defended them The cost of the defense of Attorney Johnson shall be assessed to Dr. Conway's portion of the estate. In the event the complaint is upheld by the Disciplinary Board, Attorney Johnson

shall be responsible for those expenses personally.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing findings, the Court makes the following conclusions of law:

The billings presented to the Court for Attorney's fees and Personal Representative's fees in the Estate of Guy Kjorvestad and Selma Kjorvestad are reasonable and allowed in full. Payment of reasonable fees for future services and expenses shall be allowed without prior approval of this Court provided, the fees are "reasonable" according to the criteria outline in finding #4.

Defense costs incurred by Attorney Johnson relating to the current and any future Disciplinary Board actions taken by Dr. Eileen Conway shall be assessed against and paid out of Dr. Conway's portion of the estates, unless the Disciplinary Board finds the complaints to be

meritorious, in which case, Mr. Johnson will bear the cost of his defense.

It is therefore ordered payment be allowed in the amount of $5,058.40 to First Trust Company of North Dakota and $8,762.36 to Attorney J. Phillip Johnson. Additional reasonable fee payments to the attorneys and the Personal Representative shall be allowed for future services or costs incurrred. Defense costs of the Disciplinary Board actions sahll be paid from Dr. Conway's share of the above estates unless the complaint prevails.

Dated this 23rd day of February, 1987

BY THE COURT:

JONAL H. UGLEM

NELSON COUNTY JUDGE

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

First Trust Company of

North Dakota, Petitioner and Appellee

v.

Eileen Conway Respondent and Appellant

In the matter of the Estates of Guy Kjorvestad and Selma Kjorvestad, Civil No. 870110 and 870111

Appeal from County Court of Nelson County, the Honorable Jonal H. Uglem, Judge.

AFFIRMED IN PART AND REVERSED IN PART.

Opinion of the Court by VandeWAlle, Justice.

J. Philip Johnson, of Yuill, Wold, Johnson & Federa, P.C., Fargo, for petitioner and appellee.

Eileen Kjorvestad Conway, respondent and appellant, Germantown, Tennessee, pro se.

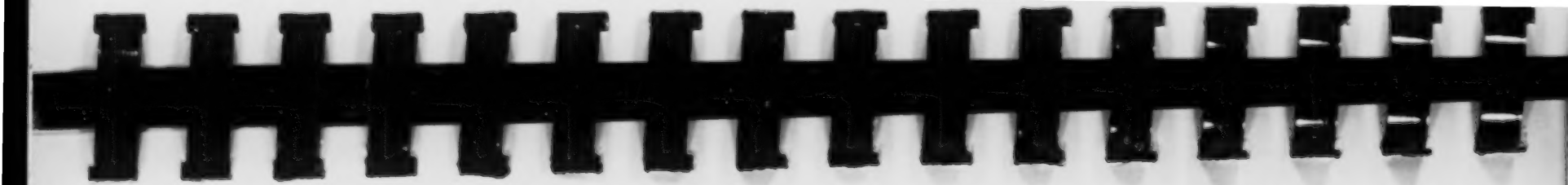
Civil Nos. 870110 and 870111

FIRST TRUST CO. V. CONWAY

VandeWalle, Justice.

Eileen Conway appealed from an order of the trial court determining that the billings for attorney fees and personal representative fees in these estates were reasonable. We affirm in part and reverse in part.

This is the seventh appeal involving these estates to which Conway is an heir. The history of this case is related in our previous opinions: Conway v. Parker, 250 N.W.2d 266 (N.D. 1977) [Kjorvestad I], Matter of Estates of Kjorvestad, 287 N.W.2d 465 (N.D. 1980) [Kjorvestad II], Matter of Estates of Kjorvestad, 304 N.W.2d 83 (N.D. 1981) [Kjorvestad III], First Trust Company of North Dakota v. Conway, 345 N.W.2d 838 (N.D. 1984) [Kjorvestad IV], Matter of Estate of Kjorvestad, 375 N.W.2d 160 (N.D. 1985) [Kjorvestad V], and Matter of Estate



of Kjorvestad, 395 N.W.2d 162 (N.D. 1986) [Kjorvestad VI].

The facts pertinent to this appeal are as follows: In Kjorvestad V we affirmed an order of the trial court approving a final accounting and ordering final distribution of the combined estates. At that time we also exercised our power under Rule 38, N.D.R.App.P., to award the personal representative, First Trust Company of Fargo (First Trust), "its reasonable compensation, attorney's fees and costs on this appeal out of Conway's share of the estate only," as a method of dealing with Conway's unrestrained and unsubstantiated accusations. 375 N.W.2d at 171.

Subsequently, on remand, First Trust mailed an affidavit and a proposed amended order to the trial court. However, it failed to give notice of a hearing to Conway. The trial court then entered and the amended order, and Conway appealed. That

appeal was denominated Kjorvestad VI. In that decision we dismissed the appeal because Conway had failed to seek a hearing before appealing. 395 N.W.2d at 162.

Subsequent to our decision in Kjorvestad VI, First Trust again applied for approval of fees. In its application First Trust asked the trial court (1) to approve an amount of fees consistent with our decision in Kjorvestad V; (2) for approval of attorney fees and personla representative fees incurred subsequent to the decision in Kjorvestad V; and (3) for authorization to pay usual and customary personal representative fees and attorney fees without further order of the court. A hearing was held on February 10, 1987. On February 23, 1987, the trial court issued its order approving fees and authorizing future fee payments as set forth in First Trust's application. The order also provided that the costs of the defense of any disciplinary

complaints against First Trust's attorney which were initiated by Conway should be borne by Conway unless found to be meritorious. It is from this order that Conway appealed.

We note that Conway's brief is not confined to the order at issue in this case but is yet another vitriolic attack on the entire course of the proceedings chronicled in our previous decisions. The brief contains vilifying accusation, all of which are unsubstantialed. We do glean from Conway's brief that she also takes issue with the order issued by the trial court. That order consists of two parts and we will analyze them separately.

The first part of the order consists of a determination that the billings presented for attorney fees and personal representative fees are reasonable, and awarding specific amounts; additionally, there is a determination that future pay-

ments for reasonable attorney and personal representative fees are allowed, based on criteria set forth in the order. After reviewing the record we cannot conclude that these determinations are clearly erroneous and therefore they are affirmed. Rule 52 (a), N.D.R.Civ.P.

The second part of the order directs that the costs of defending First Trust's attorney in current and future lawyer disciplinary actions brought before the Disciplinary Board, which are initiated by Conway, be paid from Conway's share of the estates. This order was based solely upon a request by Counsel for First Trust in his closing statement at the hearing that, "in view of the unusual circumstances with respect to the filing of a disciplinary complaint, directing arising out of the administration of these estates, we are requesting that...professional time and expenses attributable to those hearings..

be included as an expense..." Because we believe that disciplinary proceedings are beyond the scope of the probate proceedings, we conclude that the trial court erred in ordering Conway to pay current and future costs of disciplinary actions brought against counsel for First Trust. Therefore, we reverse that part of the order.

On appeal First Trust has requested that we award it costs and attorney fees pursuant to Fule 38, N.D.R.App.P., to be paid out of Conway's share of the estates. Rule 38 provides that "If the court determines that an appeal is frivolous,...it may award just damages and single or double costs including reasonable attorney's fees." We have stated that "An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith." Mitchell v. Preusse, 358 N.W.2d 511, 514

(N.D. 1984)

Normally, when we reverse part of an order or judgment on appeal, we do not deem that appeal to be frivolous. See, e.g. Matter of Estate of Gustafson, 381 N.W. 2d 308 (N.D. 1986) However, in this case we believe that Conway's extremely litigious nature, her determination to continuously rehash the entire course of the probate proceedings, and the vitriolic nature of her arguments, which only minimally touched on the merits of the order at issue in this case, demonstrate "persistence in the course of litigation which [can] be seen as evidence of bad faith." Thus we deem this appeal to be frivolous under Rule 38, N.D.R. App. P."

First Trust did not include an affidavit documenting the work performed on this appeal in its request for costs and attorney fees under Rule 38. We have previously stated:

> "We suggest that if more than a token amount of attorney fees is sought in a request to this court to impose monetary sanctions under Rule 38, N.D. R. App.P., the request should be accompanied by an affidavit documenting the work performed on the appeal to enable us to calculate the amount of reasonable attorney fees to be assessed." United Bank of Bismarck v. Young, 401 N.W.2d 517, 519, fn. 1 (N.D. 1987)

Because there was no affidavit documenting work on this appeal, we award only double costs and attorney fees in the amounts of $250, which are to be paid out of Conway's share of the estates.

Gerald W. VandeWalle

Vernon R. Pederson S.J.

Herbert L. Meschke

H.F. Gierke III

Ralph J. Erickstad, Ch.J.

PEDERSON, S.J., sitting in place of LEVINE, J., disqualified.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

JUDGMENT

Eile Nos. 870110 & 870111

Appeal from the County Court of Nelson County.

IN THE MATTER OF THE ESTATE OF GUY KJORVESTAD, SR., DECEASED

First Trust Company of North Dakota, Petitioner and Appellee

v.

Eileen Conway Respondent and Appellant

This appeal having been heard by the Court at the April, 1988, term before: The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Gerald W. VandeWalle, the Honorable H.F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Vernon R. Pederson, Surrogate Judge, Justices; and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the order of the court below be and the same is here-

by AFFIRMED IN PART AND REVERSED IN PART CONSISTENT WITH THE OPINION FILED HEREWITH. It is further ordered and adjudged that Appelle have and recover from Appellant double costs and attorney fees in the amount of $250, which are to be paid out of Appellant's share of the estate.

Dated: May 16, 1988.

By the Court:

Ralph J. Erickstad

Chief Justice

North Dakota Supreme Court

Attest: Luella Dunn

Clerk of the Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Eile Nos. 870110 & 870111

IN THE MATTER OF THE ESTATE OF

GUY KJORVESTAD, SR., DECEASED

First Trust Company of

North Dakota, Petitioner and Appellee

v.

Eileen Conway Respondent and Appellant

ORDERED, that page 5 of the opinion filed in these cases on May 16, 1988, be deleted and that page 5 filed this day be sustituted therefor.

The Supreme Court of the State of North Dakota convened at 11 a. m. this 28th day of June, 1988, with the Chief Justice, the Honorable Ralph J. Erickstad; the Honorable Gerald W. WandeWalle, the Honorable H.F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Vernon R. Pederson, Surrogate Judge, Justices; and the Deputy Clerk of the Supreme Court, Benny Barry,

being present and directed the entry of the above order.

Penny Barry

Deputy Clerk

North Dakota Supreme Court

Filed by Clerk Jun 28 1988
Supreme Court

we believe that future disciplinary proceedings are beyond the scope of the probate proceedings, we conclude that the trial court errred in ordering Conway to pay future costs of disciplinary actions brought against counsel for First Trust. Therefore, we reverse that part of the order.

On appeal First Trust has requested that we award it costs and attorney fees pursuant to Rule 38, N.D.R.App.P., to be paid out of Conway's share of the estates. Rule 38 provides that "If the court determines that an appeal is frivolous,...it may award just damages and single or double costs including reasonable attorney's"

We have stated "An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith." Mitchel v. Preusse, 358 N.W.2d 511, 514 (N.D. 1984)

Normally, when we reverse part of an order or judgment on appeal, we do not deem that appeal to be frivolous. See, e.g. Matter of Estates of Gustafson. 381 N.W.2d 208 (N.D. 1986). However, in this case we believe that Conway's

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

PETITION FOR REHEARING

File Nos. 870110 & 870111

Appeal from County Court of Nelson County

IN THE MATTER OF THE ESTATE OF

GUY KJORVESTAD, SR., DECEASED

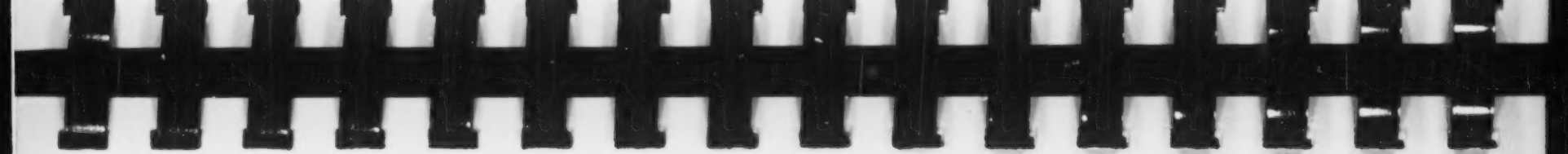
First Trust Company of

North Dakota Petitioner and Appellee

v.

Eileen Conway, Respondent and Appellant

This appeal having been heard by the Court at the April, 1988 term before: The Honorable Ralph J. Erickstad, Chief Justice; the Hnorable Gerald W. VandeWalle, the Honorable H.F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Vernon R. Pederson, Surrogate Judge, Justices; and a petition for rehearing upon the appeal and supporting Affidavit herein having been filed by J. Philip Johnson for the Appellee; and the Court having



substituted page 5 of the original opinion; and petitions for rehearing having been filed by Eileen Conway, pro se, for the Appellant; and the court having advised thereon, it is no here considered, ORDERED AND ADJUDGED, that the petitions be and the same are hereby DENIED.

AND IT IS FURTHER ORDERED, that this case be and it is hereby remanded to the County Court for further proceedings according to law, and the judgment of this court.

Dated: June 28, 1988

By the Court:

Ralph J. Erickstad

Chief Justice

North Dakota Supreme Court

Attest: Penny Barry, Deputy

Clerk of the Supreme Court

NELSON COUNTY CLERK OF COURT

Post Office Box 565

Lakota, North Dakota 58344

Audrey I. Swanke, Clerk Telephone

Susan R. Pederson, Deputy 701-247-2462

December 11, 1987

Ms. - Dr. Eileen Kjorvestad Conway

2922 South Germantown Road

Germantown, Tennessee 38138

Dear Ms. Conway: RE: Nelson County Probate - Cases #3168 & 3263

This is in response to your letter of December 4, 1987, requesting copies of the docket file of the above listed estates - namely Guy Kjorvestad, Sr. and Selma Kjorvestad. I have stated to you on the telephone that I visited with the present County Judge about this request and that we are in complete agreement that the docket sheet is not considered part of this file. Therefore, I will not send a copy to you. Your personal check #1070 in the amount of

$10.00 is enclosed.

Sincerely,

Audrey I. Swanke, Clerk of Court

Nelson County, North Dakota

NELSON COUNTY CLERK OF COURT

Post Office Box 565

Lakota, North Dakota 58344

Audrey I. Swanke, Clerk Telephone

Susan R. Pederson, Deputy 701-247-2462

Undated letter

C. Nicholas Vogel

VOGEL, BRANTNER, KELLY, KNUTSON, WEIR & BYE, LTD.

P. O. Box 1389

Fargo, North Dakota 58107

Dear Attorney Vogel: RE: Est. Guy Kjorvestad
& Selma Kjorvestad
Nelson County Court

This is in response to your letter of December 22, 1987, requesting copies of the docket sheet from the County Court Probate Docket Book. The County Judge for Nelson County and myself consider this office information and not available for public distribution. I do not know if you are familiar with these probates but

the listings are too numerous to copy and really are of value only to this office.

Enclosed herewith is your office check No. 14943 made payable to Clerk of the Nelson County Court.

Sincerely,

Audrey I Swanke, Clerk of Court

Nelson County, North Dakota

IN THE PROBATE COURT OF NELSON COUNTY,

STATE OF NORTH DAKOTA

IN THE MATTER OF THE

THE ESTATE OF SELMA KJORVESTAD, DECEASED.

PETITION TO INSPECT PROBATE FILE,

INCLUDING DOCKET FILE, OF

THE ESTATE OF SELMA KJORVESTAD

Eileen Conway, your petitioner, herein, being duly sworn under oath, deposes and says:

That Selma Kjorvestad died on the 15th of May, 1974 and at the time of her death was a resident of the city of Aneta, in the County of Nelson and the State of North Dakota.

That the said Selma Kjorvestad left a Last Will and Testament which was presented to the Nelson County Probate Court [by the Nelson County Probate Court]. The Estate of Selma Kjorvestad is probated under the North Dakota Century Code. The

State of North Dakota extended the protestion of the North Dakota Century Code under the provisions For Transition of Section 30.1-35-01 of the Uniform Probate Cdoe adoped on July 1, 1975.

That the petitioner is the daughter of Selma Kjorvestad and a beneficiary of the decedent's estate. In violation of NDCC 30-20-15, Notices of secret, underground hearings in the Nelson County Underground Probate Court have been withheld from Eileen Conway, an interested party in the Estate of Selma Kjorvestad. In violation of NDCC 30-20-15, Notices of illegal, secret, counterfeit court orders signed in the Nelson County Underground Probate Court were withheld from Eileen Conway in order to defraud the Estate of Selma Kjorvestad and her beneficiary, Eileen Conway

The entire probate procedure requir-

ed by the North Dakota Century Code was aborted to cover-up the disappearance of $974,740.00 in cash assets belonging to the Estate of Selma Kjorvestad. Section 30-20-01 of the North Dakota Century Code requires an accounting of the $974,780.00 every six months. Cash assets totally $974,780.00 belonging to the debt-free Estate of Selma Kjorvesad have disappeared from the Nelson County Court without a single accounting in fourteen years.

Clerk of Court, Register of Deeds and former Nelson County Probate Judge, Audrey Swanke, and Deputy Clerk of Court, Susan Pederson, have blocked Eileen Conway, an interested person in the Estate of Selma Kjorvestad, from inspecting the Probate File, including the entries of the Docket File, of the Estate of Selma Kjorvestad. The debt-free Estate of Selma Kjorvestad is bankrupt.

That pursuant to the North Dakota Century Code the said Eileen Conway petitions the Nelson County Probate Court that former Nelson County Probate Judge, Clerk of Court and Register of Deeds, Audrey Swanke, and Deputy Clerk of Court, Susan Pederson, be compelled to allow Eileen Conway to inspect and copy documents filed in the Probate File, including entries in the Docket File, of the Estate of Selma Kjorvestad and permit access to the public records of Nelson County in order to protect her interest in $974,780.00 in cash assets and, in addition, farmland and real estate belonging to the Estate of Selma Kjorvestad.

Dated this 4 day of April, 1988.

Eileen Conway

Petitioner

STATE OF TENNESSEE

COUNTY OF SHELBY

On this 4 day of April, 1988, before me personally appeared Eileen Conway, known to me to be the person who is described in and who executed the within and foregoing instrument and severally acknowledged to me that she executed the same.

Patrick F. McLaughlin

Notary Public

Shelby County, Tennessee

My commission expires June 2, 1990

CONSTITUTIONAL PROVISIONS, STATUTES,

RULES AND REGULATIONS APPENDIX

Amendment 14, Constitution of the United State of America, Section I.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citiznes of the United States; nor shall any State deprive any citizens of life-liberty, or property, without due process of law; nor deny person within its jurisdiction the equal protection of the laws.

Amendment 8, Constitution of the United States of America.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

NORTH DAKOTA CONSTITUTION, ARTICLE XI

Section 5. Unless otherwise provided by law, all meetings of public or goernmental bodies, boards, bureaus, commissions, or agencies of the state of any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be open to the public.

Section 6. Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state of any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

Uniform Probate Code. Chapter 30.1-35-01 (8-101). Time for taking effect--Provisions for transition.

1. This title takes effect on July 1, 1975.
2. Except as provided elsewhere in this title, in the effective date of this title;
   a. It applies to any wills of decedents dying thereafter. No provision of this title, however, shall be effective to invalidate any will executed prior to July 1, 1975, when that will would be valid under the laws of this state in effect at the time of its execution.

North Dakota Office of State Tax Commissioner.

May 28, 1981 letter regarding tax conseqences of deaths prior to July 1, 1975, the date of transition from the North Dakota Century Code to the Uniform Probate

Code:

"In the view of the fact that this decedent passed away prior to July 1, 1975, this matter must be processed through the county court as provided for under Chapter 57-37, North Dakota Century Code, which was in force on the date of death.

NDCC 30-20-15. Account allowed upon proof of notice--Decree must show making of proof--Conclusive evidence of fact.--The account of an executor or administrator must not be allowed by the court until it is proved that notice has been given as is required by this chapter. The decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact.

NDCC 30-20-13. Persons interested may appear on hearing account.--On the day appointed, or on any subsequent day to which the hearing on the report and account of an executor or administrator may be postponed

by the court, any person interested in the estate may appear and file his exception in writing to the account, and may contest the same.

NDCC Section 30-15-01. Inventory by executor or administrator required.--An executor or administrator of an estate, withint thirty days after his appointment, must make and return to the county court a true inventory and appraisement of all the real and personal property of the decedent which has come to his knowledge.

NDCC Section 30-15-02. Inventory--Contents. --An executor or administrator shall class property inventoried by him, and liens and encumbrances thereon under separate heads as follows:

1. All real estate, with a statement showing what portion thereof, if any is occupied or claimed as a homestead.
2. All the personal property which is deemed absolutely excempt.

3. All additional exempt personal property;

4. The avails of a life insurance policy or of a contract payable by any mutual aid or benefit society when made payable to the deceased, his personal representatives, heirs, or estate, subject to the provisions of section 26-1-18;

5. Other personal property, including all bonds, morgages, notes, book accounts, and other securities or evidences of debt which appear by the books or papers of the deceased to be settled, with a statement of the sums credit thereon if any:

6. Cash, if any, and if no money has come into the hands of the executor or administrator, that fact shall be stated;

7. All other property;

8. The amount of each lien, mortgage, or encumbrance on the real estate or personal property of the decedent, if any,

the balance upon which before entering upon their duties the appraisers must each subscribe an oath administered by a competent officer to the effect that he will truly impartially according to the best of his ability appraise the property of the decedent and discharge all other duties required by him as appraiser. If any portion of the property is in another county the same appraisers may serve or others may be appointed in that county. The notice and oath of the appraisers must be returned with the inventory together with a verified statement of their services and expenses. They shall be allowed a reasonable compensation for their services and the amount of their necessary expenses as may be fixed or approved by the court, to be paid by the executor or administrator as expenses of the administration.

NDCC 30-15-03. Inventory--Form.--The executor or administrator of an estate must sign the inventory and must take and subscribe thereon an oath before an officer authorized to administer oaths that the inventory contains a true statements of:

1. All the estate of the decedent which has come to his knowledge and possession;
2. All money belonging to the decedent;
3. All just claims of the decedent against the affiant; and
4. All liens, mortgages, or other encumbrances on the real and personal property of the deceased.

NDCC 30-15-09. Supplementary inventory--Omitted property.--Whenever property which is not included in an inventory previously made in the same case comes to the knowledge or possession of an executor or administrator, he, within one month thereafter or within such time as the court orders, must make a supple-

mentary inventory and cause an appraisement thereof to be made and returned in like manner.

Section 30-20-01. Accounting by executor or administrator.--An executor or administrator of an estate must render to the county court a full account and report:

1. At the expiration of six months after letters testmentary or letters of administration are issued;

2. At the expiration of one year after such letters are issued;

3. At any time required by the court, either on its own motion or upon the application of any other person interested in the estate;

4. Whenever the administration of the estate is ready for final settlement. The report and account then rendered shall be known as the final report and account.

NDCC Section 30-20-05. Examination of executor or administrator--Vouchers file.--In rendering an account, an executor or administrator must file the vouchers for all charges, debts, claims and expenses which he had paid. He may be examined on oath touching the payments, and also touching the property and effects of the decedent, and the disposition thereof. If any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file, and if a voucher is lost, or for some good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness.

NDCC Section 30-20-07. Person interested in estate may apply for account.--Any person interested in an estate, at any time before the settlement of the final account of an executor or administrator, may present his petition to the county court praying that the executor or administrator be required to appear and render an account as is required in section 30-20-01, and settling forth the facts showing that it is necessary and proper that such an account be rendered.

NDCC Section 30-20-09. Failure to file report--Order of court--Issuance of attachment.--If any executor or administrator fails, neglects, or refuses, after having been duly cited, to render an account as if required by this chapter or by order of court, the court must:

1. Issue an attachment for contempt against him and require the making of

the account; or

2. Revoke his letters as provided by section 30-12-02.

NDCC Section 30-20-14. At the hearing on an account, any matter not concluded on the settlement of a former account, nor upon any other proceeding in court, may be contested by any party interested for cause shown. The court may appoint one or more referees to examine accounts and make report thereon, subject to confirmation, and may allow a reasonable compensation to the referee to be paid out of the estate of the decedent.

in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, whether through arrest, attachment, garnishment, or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of the answer, claim or appearance shall be made upon the person having custody of possession of the property at the time of its seizure.

N.D. Rules of Appellate Procedure, Rule 30.

(a) Duty of Appellant To Prepare and File; Contents of Appendix; Time for Filing; Number of Copies. The appellant shall prepare and file separately bound appendix to the briefs which must contain:

2. the relevant docket entries in the proceeding below:

N.D. Rules of Appellate Procedure, Rule 38.

Damages for Delay.

If the court determines that an appeal is

N.D. Rules of Civil Procedure, Rule 5. Service and Filing of Pleadings and other Papers.

(a) Service--When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discover required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need to made on parties in default for failure to appear except that pleadings asserting new and additional claims for relief against them shall be served upon them

frivolous, or that any party has been dilatory in prosecuting the appeal, it may award just damages and single or double costs including reasonable attorney's fees.

The North Dakota Rules of Disciplinary, Rule 22.

(a) Complaints submitted to the disciplinary board and the testimony with respect thereto are absolutely privileged and no lawsuit predicated thereon may be instituted.

American Bar Association, Standards for Lawyer Discipline and Disability Proceedings.

Section 8.3. Immunity of Complainants. Complainants should be absolutely immune from civil liability for all communications to the agency, but disclosure of the information to anyone else should not be protected.

N.D. Rules of Civil Procedure,

Rule 52(b)

(b) Amendment. Upon motion of a party made not later than 10 days after notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

STATE OF NORTH DAKOTA

OFFICE OF STATE TAX COMMISSIONER

STATE CAPITOL, BISMARCK, NORTH DAKOTA 58505

701-224-2770

Kent Conrad, COMMISSIONER

May 28, 1981

Phil Stafne

Attorney at Law

P. O. Box 1680

Fargo, ND 58107

Re: Estate of Selma Kjorvestad

Date of Death - May 15, 1974

Dear Mr. Stafne:

In view of the fact that this decedent passed away prior to July 1, 1975, this matter must be processed through the county court as provided for under Chapter 57-37, North Dakota Century Code, which was in force on the date of death.

To effectively finalize matters regarding this estate, an amended Form 131 must be prepared and submitted to the Nelson Coun-

ty Court.

THIS IS THE FINAL NOTICE OF FILING REQUIREMENT WHICH WILL BE ISSUED FROM THE OFFICE OF THE TAX COMMISSIONER.

Sincerely,

Bonnie Orndorg

Estate Tax Examiner

Phone: 224-3470

Supreme Court, U.S.
FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-707 and 88-708

In The

Supreme Court of the United States

October Term, 1988

EILEEN CONWAY,

Petitioner,

vs.

FIRST TRUST COMPANY OF NORTH DAKOTA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

BRIEF IN OPPOSITION

J. PHILIP JOHNSON
(Counsel of Record)
YUILL, WOLD, JOHNSON & FEDER, P.C.
414 Gate City Building
P.O. Box 1680
Fargo, ND 58107
(701) 235-5515
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 pp

QUESTION PRESENTED

Does a Petition for Writ of Certiorari to review a decision of the North Dakota Supreme Court affirming an Order of the Nelson County, North Dakota, Court allowing attorney's fees and Personal Representative's fees in a probate proceeding present any federal constitutional issue?

AFFILIATED CORPORATIONS

First Trust Company of North Dakota is a wholly-owned subsidiary of First Bank System, Minneapolis, Minnesota. Other subsidiaries include:

CMB Investment Counselors

FBS Agricultural Credit Corporation

FBS Brokerage Services, Inc.

FBS Card Services, Inc.

FBS Leasing Corporation

FBS Merchant Banking

FBS Mortgage Corporation

FBS Properties Management, Inc.

First Group, Inc.

First Insurance

Matrix Leasing International, Inc.

First Trust, Inc.

First Trust Company of Montana

There are First Bank banking subsidiaries at over 94 locations throughout the states of Minnesota, North Dakota, South Dakota, Montana, Washington and Wisconsin.

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In the Matter of Estates of Kjorvestad, 287 N.W.2d 465 (N.D. 1980) 1

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Annot. 18 L.Ed.2d 1388, 1412 12

Uniform Probate Code (U.L.A.), p.1 (1988 Supp.) 11, 12

OPINIONS BELOW

Mrs. Conway, the Petitioner, has not provided citations for the reported decisions of the North Dakota Supreme Court involving these estates. Those decisions, and their citations are: *Conway v. Parker*, 250 N.W.2d 266 (N.D. 1977); *In the Matter of Estates of Kjorvestad*, 287 N.W.2d 465 (N.D. 1980); *In the Matter of Estates of Kjorvestad*, 304 N.W.2d 83 (N.D. 1981); *First Trust Company of North Dakota v. Conway*, 345 N.W.2d 838 (N.D. 1984); *In the Matter of Estates of Kjorvestad*, 375 N.W.2d 160 (N.D. 1985); *In the Matter of Estates of Kjorvestad*, 395 N.W.2d 162 (N.D. 1986); *First Trust Company of North Dakota v. Conway*, 423 N.W.2d 795 (N.D. 1988).

JURISDICTION

The Final Judgment and Decision of the North Dakota Supreme Court which is the subject of this appeal was entered June 28, 1988. That decision reviewed a County Court order which dealt only with fees of the Personal Representative of the Estates of Guy Kjorvestad and Selma Kjorvestad and the fees of its attorney subsequent to the Final Report and Accounting. The decision and judgment of the North Dakota Supreme Court which affirmed the Findings of Fact, Conclusions of Law and Order of the Nelson County Court relating to the final account and distribution of the estates was entered October 1, 1985. A decision and judgment of the North Dakota Supreme Court dismissing the appeal of Amended Findings of Fact, Conclusions of Law and Order for Distribution, which included approval of additional fees incurred

as a result of the previous appeal, was entered October 28, 1986.

Mrs. Conway claims jurisdiction under the Fourteenth and Eighth Amendments to the United States Constitution relating to the handling and accounting of the estates. However, the only matter presented by this appeal is the approval of fees for the personal representative and its attorney. No jurisdictional statute is cited.

STATEMENT OF THE CASE

The estates of Guy and Selma Kjorvestad, a farm couple from the small rural community of Aneta, North Dakota, present the most litigated probate proceedings in the history of North Dakota. Guy Kjorvestad died on January 17, 1973. His wife, Selma, died a little more than a year later on May 14, 1974. Their two daughters, Lorraine Parker of Grand Forks, North Dakota, and Eileen Conway of Germantown, Tennessee, were named as joint executrices under the will of Selma Kjorvestad and were appointed jointly for the estate of Guy Kjorvestad.

The concept of joint administration, difficult even with mutual respect and patience, soon dissolved into rancor and dispute between the two daughters. Each daughter then retained her own lawyer. Under the procedures then in effect, appeals progressed from the county probate court to the District Court and from the District Court to the state Supreme Court. In January of 1977, the first appeal to the North Dakota Supreme Court was decided, relating to questions of representation

before the Internal Revenue Service, payment of attorneys' fees and a partial distribution to the heirs.

By May of 1979, due to the disputes and impasse in administration, the Nelson County Court ordered both of the executrices removed. That ruling was later sustained by the District Court and in September of 1980, the County Court of Nelson County appointed First Trust Company of North Dakota as successor representative under a supervised administration as provided by the Uniform Probate Code, as adopted and in effect in North Dakota on July 1, 1975.

In the meanwhile, an appeal of a previous order regarding payment of legal services progressed to the North Dakota Supreme Court which, in January of 1980 denied Mrs. Conway's appeal. In December of 1982 a hearing was had in Nelson County Court upon an interim reconstructed account by the successor Personal Representative and upon interim fees. Orders approving the account and the fees were entered.

On April 29, 1983, a hearing was held in Nelson County Court for approval of amended estate tax filings, payment of previously incurred legal and accounting services and payment of interim fees of the successor Personal Representative and its attorney. An order of approval was entered and, since the appeal procedure had been revised, the order was appealed by Mrs. Conway directly to the North Dakota Supreme Court. That order was affirmed in a decision of the Supreme Court dated February 23, 1984. In December of 1983, another County Court order was entered, after hearing, approving certain disbursements and fees. This order was also

appealed by Mrs. Conway, but the appeal was dismissed by the Supreme Court on motion.

On September 21, 1984, a hearing was held before County Judge Ronald Dosch at Lakota, North Dakota, upon a proposed Final Report and Account by the successor Personal Representative. Mrs. Conway appeared personally and presented extensive objections. Findings of Fact, Conclusions of Law and Order for Allowance of the Final Account and for distribution in each estate were entered by Judge Dosch on October 2, 1984. The orders were appealed to the North Dakota Supreme Court by Mrs. Conway. On October 1, 1985, the North Dakota Supreme Court affirmed the orders and directed that the fees of First Trust and its attorney arising from the appeal, as approved by the County Court, be assessed against Conway's share of the estates.

Upon remand to the County Court, First Trust Company submitted its affidavit as to fees together with proposed amended findings and orders to Judge Dosch with copies served upon Mrs. Conway. The amended findings and orders were approved and signed by Judge Dosch on December 5, 1985. Mrs. Conway appealed the amended orders to the Supreme Court and on October 28, 1986, the Supreme Court dismissed the appeal but held that Mrs. Conway was entitled to a hearing with respect to fees.

First Trust Company then petitioned the County Court for authorization and approval to pay unpaid and future attorney's and personal representative's fees. A hearing was held before County Judge Jonal Uglem on February 10, 1987, at Lakota, North Dakota. Mrs. Conway appeared and made her objections. On February 23, 1987,

Judge Uglem entered her order approving accrued fees and authorizing future payments to the Personal Representative and its attorney. Mrs. Conway appealed this order to the North Dakota Supreme Court. In its opinion and judgment dated June 28, 1988, the North Dakota Supreme Court affirmed the Order, except as to any provision for future fees arising from defending disciplinary complaints against the Personal Representative's attorney which were not sustained, and allowed double costs and attorney's fees of $250.00 against Mrs. Conway.

Mrs. Conway subsequently filed a Petition for Writ of Certiorari in this Court for review of the June 28, 1988, judgment of the North Dakota Supreme Court. She also has written the Clerk of the Nelson County Court requesting a docket file or sheet on the estates which the Clerk declined to provide. Mrs. Conway on April 4, 1988, apparently prepared a Petition to Inspect Probate Files addressed to the Nelson County Court. To our knowledge, the Petition has never been set for hearing, acted upon, nor is there any provision in the court rules or rules of procedure for such petition.

From 1975 through 1984 Mrs. Conway was represented by a succession of twelve different lawyers or law firms. From 1984 to the present she has proceeded *pro se*. She has also filed disciplinary complaints against each of the attorneys representing her sister and the successor Personal Representative. All of such complaints have been denied. She has had her objections heard before four different County Court Judges, two District Court Judges,

and nine different Justices of the five-member North Dakota Supreme Court.

SUMMARY OF ARGUMENT

Mrs. Conway's petition is a repetition of unsubstantiated claims and allegations made against participants in the judicial process over the past fourteen years. In the numerous hearings and appeals over that period of time, no substantial evidence of this "probate crime" and coverup has ever been provided.

There is no federal question for decision by this Court since the most recent appeal dealt only with approval of fees and sanctions for a frivolous appeal. The sanctions imposed, charging her with fees relating to a frivolous appeal were consistent with federal practice and mild in view of the case history. There are no equal protection or due process violations because Mrs. Conway was accorded full and multiple hearings upon her objections under the Uniform Probate Code and the rules of procedure applicable to civil actions in North Dakota.

ARGUMENT

1. Petitioner Presents no Claim of Substance.

It is difficult to frame an intelligent response to an argument which takes as its essential premise the corruption of the entire judicial system of the State of North Dakota. The initial response must be that the judges, lawyers, court personnel and parties involved are not

corrupt and Mrs. Conway has never presented credible evidence of what she consistently describes as "the probate crime of the century."

Justice Meschke of the North Dakota Supreme Court, in October, 1985, when the merits of the final account were actually before the Court, made the following summary of Mrs. Conway's claims:

> Without any references to the record, Conway's "statement of facts" rails against her sister ("manic crime spree;" "embezzled money;" "embezzled bonds, cash, bank money-orders, checks;" "forged" signatures; "illegally redeemed securities and illegally moved $100,668.68 in cash assets;" "looted four safe deposit boes [sic];" "destroyed . . . monthly bank statements to cover-up additional forgeries;" "destroyed all records;" and "embezzled approximately $39,000.00 from the estate"); rails against one prior attorney for the estate ("deceitfully misrepresenting himself;" "defied two court orders," "felonies, fraud, forgeries, theft, embezzlements and a tangled web of falsified records to cover-up the wrong-doing;" "10 years of trama [sic], threats, insults, verbal and non-verbal abuse inflicted" by him on her; his "ruthless, vicious interference;" "conspired;" "concealed;" acted "illegally;" "also practiced deceit;" and "cover-up [of] massive fraud and felonies committed against the estate."); rails against one of her own lawyers ("concocted a scheme;" "lied;" participating in a "fraudulent" report; "fraudulent accountimg" [sic] and a "fraud scheme.") and rails against a prior accountant ("falsified bank deposits to cover-up Parker's embezzlements;" "falsified grain sales;" and "falsified bank account ownership.")
>
> Her unsupported vilification extends to a county judge ("brutally assaulted Conway;" "cover up" of "irregularities;" "illegal court order;), a district judge

> ("[f]alse statements;" "illegal Amendment to Judgment . . . to cover-up the 'doctored' files and the payoffs made to cover up the fraud;") and a clerk of court ("disoriented, hysterical behavior").
>
> She proceeds with scathing accusations against First Trust and those associated with it. She rails that First Trust "breached their fiduciary duty," "committed perjury," "employed perjury, deception, misrepresentation and fraud to cover-up" assets and "committed perjury." She accuses an officer of First Trust of making "thirteen false statements . . . to cover-up" prior "illegal" activities of a lawyer for the estate, and accuses a lawyer for First Trust of "making sixteen false statements . . . to cover-up" such activities.
>
> None of these vituperations are supported by any references to the record. Thus, Conway's presentation is lacking in evidence though lengthy in vilification.

In the Matter of the Estates of Kjorvestad, 375 N.W.2d 160, 164 (N.D. 1985).

Vilification notwithstanding, the Supreme Court proceeded to a careful examination of the procedures followed and actions taken by the successor personal representative.

The reconstructed account for the administration of Mrs. Conway and her sister, the collection of assets, the accounting for assets and the compensation for First Trust and its attorney were all reviewed and found not legally wanting.

2. There is no Federal Question.

As contemplated by Rule 17, Sup.Ct.R., a writ of certiorari will be granted only for special and important

reasons. One of these reasons would be when a state court of last resort has decided a federal question in conflict with the decision of another state or a federal court of appeals. Another would be when a state court has decided an important question of federal law which is in conflict with a decision of this Court or which should be settled by this Court.

The decisions of the North Dakota Supreme Court in this case are simply interpretations of probate law under the statutes and civil rules of North Dakota. The major argument of Mrs. Conway revolves about whether procedures in the estates were governed by North Dakota statutes in effect before or after July 1, 1975.

No federal question was ever presented for decision by the Supreme Court of North Dakota.

There were three issues before the North Dakota Supreme Court: (1) Were the allowances of attorneys' fees and personal representative's fees clearly erroneous? (2) May the county court allow costs of defending unsubstantiated disciplinary complaints as a charge against Mrs. Conway's share of the estates? (3) Was the appeal frivolous, justifying an assessment of costs and fees against Mrs. Conway?

3. Sanctions for Frivolous Pleading and Litigation are Fully Justified.

If there is any cause for wonder about the history of these estates it is not that the North Dakota Supreme Court has applied extraordinary sanctions. Rather, the wonder is that the Court has applied so few and such

minor sanctions for litigation that has been, at least over the past four years, totally repetitive, frivolous and full of libelous allegations. Once the constraints of representation by a member of the bar were removed, Mrs. Conway returned again and again to her basic premise, that her sister and her sister's attorneys had stolen from the estates and everyone thereafter was covering up.

The Court proceeded under Rule 38 of N.D.R. App.Proc., which provides:

> If the court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee, including reasonable attorney fees.

This rule follows closely Rule 38, Fed.R.App.P., applicable to the federal courts of appeal.

Recognizing the burden of frivolous litigation in an already overburdened judicial system, the Federal Civil Rules have increased the standards to be applied and the sanctions to be imposed. Under the most recent amendments:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or

> other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11, Fed.R.Civ.P.

These directives are consistent with sanctions for failing to make discovery. See Rule 37(b)(2), Fed.R.Civ.P. It is unlikely that a federal district court judge would have exercised the extreme patience displayed by the North Dakota Supreme Court.

4. This Extensively Litigated Probate Proceeding Presents no Equal Protection or Due Process Violation.

The equal protection clause of the Fourteenth Amendment does not assure uniformity of judicial decisions or immunity from judicial error. *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). Mrs. Conway's claims of error in rulings by the County Court of Nelson County, as reviewed by the North Dakota Supreme Court, present matters well within the sound discretion of those judicial bodies.

Whatever procedures are fair, what state process is constitutionally due, what distinctions are consistent with equal protection, all depend on the particular situation presented. *Cohen v. Hulen*, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed. 156 (1961).

The Uniform Probate Code, as adopted in North Dakota and applied in these estates, is a product of the

respected National Conference of Commissioners on Uniform State Laws and has been adopted in at least sixteen states. Uniform Probate Code (U.L.A.), p.1 (1988 Supp.). It is far from an aberrant or illconceived piece of legislation.

The Constitution commits to the states the power to control administration of their citizens' estates. *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971); *American Trust Co., Inc. v. South Carolina State Bd. of Bank Control*, 381 F.Supp. 313 (D.S.C. 1974).

It seems questionable that the "excessive fines" provision of the Eighth Amendment is applicable to the states through the Fourteenth Amendment. See *Collins v. Johnston*, 237 U.S. 502, 35 S.Ct. 649, 59 L.Ed 1071 (1915); Annot. 18 L.Ed.2d 1388, 1412. However, the same considerations of judicial discretion under the due process and equal protection clauses would apply. In addition, that provision is addressed to the criminal jurisdiction of the courts rather than the civil proceedings applicable here.

CONCLUSION

The petition for writ of certiorari to the North Dakota Supreme Court presents an interesting case study in how the judicial process in a probate proceeding may be extended, delayed, complicated and made expensive by a determined litigant with substantial resources. This case has already clogged the calendar of the Supreme Court of North Dakota for eleven years. It has no place on the calendar of the Supreme Court of the United States.

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Respectfully submitted,

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